88-1409

No.

FEB 23 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DAVID C. WALENTAS,

Petitioner,

vs.

KENNETH LIPPER, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4 and JOHN DOE #5,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the *Harlow-Anderson* qualified immunity defense in a civil rights action brought pursuant to 42 U.S.C. §1983, precludes liability for money damages unless there is a factually identical case which clearly establishes that the government official's conduct was unconstitutional?

2. In the absence of closely analogous decisional law, should the court consider the "objective legal reasonableness" of the government official's conduct in order to determine whether a "clearly established" constitutional right has been violated?

PARTIES TO THE PROCEEDING

The petitioner is David C. Walentas, a New York real estate developer. The respondent is Kenneth Lipper, a former Deputy Mayor of the City of New York. The complaint originally named John Does ##1-5 as defendants, but those parties, whose identities have never been disclosed, are not respondents herein.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner David C. Walentas respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on November 25, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not reported, but is reprinted as Appendix A hereto. The opinion of the United States District Court for the Southern District of New York dated June 17, 1987, is reported

as *Walentas* v. *Lipper* at 662 F.Supp. 902 (S.D.N.Y. 1987), and is reprinted as Appendix C hereto. The opinion of the United States District Court for the Southern District of New York dated June 3, 1986, is reported as *Waltentas* v. *Lipper* [sic], at 636 F.Supp. 331 (S.D.N.Y. 1986), and is reprinted as Appendix F hereto.

JURISDICTION

The petitioner commenced this action pursuant to 42 U.S.C. §§1983 and 1988 and their jurisdictional counterpart 28 U.S.C. §1343. The jurisdiction of this Court to review the judgment of the Second Circuit entered on November 25, 1988, is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petitioner brought this action pursuant to 42 U.S.C. §§ 1983 and 1988 claiming that the respondent deprived the petitioner of rights secured by the Fourteenth Amendment to the United States Constitution. The foregoing provisions are set forth in Appendix G.

STATEMENT OF THE CASE

Petitioner David C. Walentas is a prominent real estate developer in the City of New York. Respondent Kenneth Lipper was the Deputy Mayor for Finance and Economic Development of the City of New York from January 1983 until March 1985. Walentas brought this civil rights action pursuant to 42 U.S.C. §1983 to recover damages for Lipper's blatant misuse of public office, and his malicious interference with Walentas' right to earn his livelihood.

In this action Walentas claims that Lipper, in order to satisfy a personal vendetta, engaged in a series of activities, the cumulative effect of which was to cause great economic harm to Walentas. The complaint alleged that Lipper publicly defamed Walentas, and arbitrarily removed him as the developer of a section of the Brooklyn waterfront known as Fulton Landing.

Walentas further alleged that this stigmatizing denial of a government contract, coupled with the foreclosure from other business opportunities, constituted a deprivation of liberty without due process of law. Moreover, Walentas argued that Lipper's actions under the color of state law, constituted a deprivation of a constitutionally protected property interest.

Lipper's animosity for Walentas dates back to the 1970's, when Lipper invested in two real estate ventures organized and managed by Walentas. Lipper's personal vendetta was fueled by his irrational belief that Walentas was responsible for the suicide of their mutual friend, J. Frederic Byers III, who at the time of his death was Walentas' partner in the Two Trees Management Company.

The record below is replete with evidence, beyond what Lipper did as a public official, of Lipper's deep personal hostility toward Walentas.[1] A trail of letters to and from the government officials involved in the Brooklyn waterfront project documented Lipper's blatant animosity. For instance, one official warned another to "move cautiously in your flirtations on [Fulton Landing]" because Lipper is "apparently vehemently opposed to the Walentas sponsorship" (JA 350). Similarly, a member of the Editorial Board of the *New York Times* testified in a deposition that after meeting with Lipper, he had "no doubt whatever" that Lipper blamed Walentas for the suicide of Byers, and that this influenced Lipper's judgment regarding Walentas' suitability for the government project (JA 410-414).

Rather than recuse himself based on their prior business and personal relationship, Lipper intimately involved himself in Walentas' dealings with the City government, and deliberately used his public office to carry out his private feud. Within a few months of his appointment as Deputy Mayor, Lipper launched a personal smear campaign aimed at destroying Walentas' professional reputation, which campaign resulted in

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[1] References to the record below are to the Joint Appendix filed with the Second Circuit which is referred to herein as "JA."

Walentas' removal from the Brooklyn waterfront project, and foreclosed him from several other valuable real estate opportunities.

The de-designation of Walentas as the developer of Fulton Landing was only one of several incidents that triggered this controversy. The record shows that in 1981, Walentas, acting through a partnership called Brooklake Associates, began to purchase certain property located near the Brooklyn waterfront. Walentas' vision was to transform this run-down section of abandoned warehouses and rotting piers into a thriving commercial center. Ultimately, Walentas acquired, at a cost of approximately $16.5 million, eleven industrial buildings comprising over two million square feet in the area (the "Brooklake properties").

Immediately adjacent to the Brooklake properties were several parcels of land which were owned in part by the City and the State of New York. On June 3, 1981, the three government agencies charged with overseeing this property, jointly issued a Solicitation For Development Proposals, in an effort to secure a private developer who would undertake the construction of a commercial, residential, and recreational complex on the government-owned parcels (the "SDP site").

Walentas submitted a development proposal, and by an agreement dated May 27, 1982, his company, Two Trees Management Company, was conditionally designated as the developer of the government site (JA 147). By October of 1983, Walentas had reached a final agreement with the three government agencies on construction plans and a budget for the project, which was estimated to cost $160 million (JA 447). By year end, Walentas had expended $651,000 in development costs, including architectural plans, engineering fees, surveys, permits, and an environmental impact study (JA 27).

By January 1983, Walentas' plans were well on their way to being realized, when Kenneth Lipper was appointed Deputy Mayor for Finance and Economic Development of the City of New York. In his capacity as Deputy Mayor, Lipper supervised the Office of Economic Development which encompassed one

of the three government agencies responsible for the development of Fulton Landing. At Lipper's direction, the City agency imposed additional restrictions on Walentas, such as finding a partner for the project (JA 351-352). Simultaneously, Lipper made it known to potential partners that any partnership with Walentas on the waterfront project would be viewed by City Hall with extreme disfavor (JA 301).

In his capacity as Chairman of the New York City Industrial and Commercial Incentive Board (the "ICIB"), Lipper repeatedly postponed hearings on Walentas' application for a tax abatement on the Brooklake properties adjacent to the SDP site. Lipper's unjustified delays prevented Walentas from concluding a $10 million lease with the investment firm of Lehman Brothers Kuhn Loeb to occupy one of the Brooklake buildings. Moreover, Lipper urged the officers of Lehman Brothers, where Lipper had previously been employed, not to enter into a lease with Walentas.

In connection with the ICIB hearings, on February 10, 1984, three local politicians held a press conference and distributed a press release containing false and disparaging information about Walentas.[2] Despite the fact that Lipper knew that these allegations were false, he publicly declared that he would order an investigation by the New York City Department of Investigation (DOI). Lipper then directed the DOI Commissioner to prepare a report confirming the accusations regardless of their accuracy. With record speed, in nine working days the DOI issued a report rehashing the press release, even though no investigation had been conducted. The DOI Commissioner subsequently referred to the report as a "dirty case," and admitted that he was "embarrassed" by its contents (JA 486, 493). The DOI also subsequently determined that much of their initial information was inaccurate (JA 491).

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[2] In their press release, City Council Members Ruth Messinger and Sal Albanese, and State Assemblyman Joseph Ferris, characterized Walentas as a "bad apple," and accused him of being a "bad building manager, landlord and co-op sponsor," with a "track record" of "suspicious fires" and other alleged violations (JA 71-73).

Even though he knew the DOI report was false, Lipper had it distributed to the press. A few days later, on March 5, 1984, Lipper held a press conference formally "de-designating" Walentas as the developer of the Fulton Landing project. During the press conference Lipper made several disparaging remarks about Walentas, including the statement that Walentas' only previous commercial experience was that "he ran a dry cleaner" (JA 452).

It is significant to note that in de-designating Walentas, Lipper acted *unilaterally* on behalf of the City, without consulting the two New York State agencies which were jointly responsible for the development of Fulton Landing, and despite their angry letters protesting his despotic actions (JA 353,367). It is also significant that Lipper has never denied harboring a personal vendetta against Walentas, nor has he denied that he used his position as Deputy Mayor to wage a private war against his former business partner.[3]

Lipper's defamatory remarks, combined with his arbitrary and capricious removal of Walentas from the Fulton Landing project, have marked Walentas with a stigma which continues to oppress him to this day. Moreover, Lipper's campaign to malign Walentas' professional reputation has had ramifications beyond the Brooklyn waterfront and has foreclosed him from other real estate development opportunities.

With respect to other government projects, the City reneged on its promise to extend Walentas' one-year lease on an abandoned parking lot near Fulton Landing, despite the fact that Walentas spent nearly $200,000 on improvements to the lot, and despite the City's previous assurances that the lease would be

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[3] The only statement in the record from Lipper is a one-page affidavit in support of his motion for summary judgment, which obliquely states, "[a]t all times, my actions regarding the proposed Fulton Landing development project and plaintiff were in fulfillment of my official duties as Deputy Mayor." (JA 289).

extended (JA 321-322). The City also inexplicably denied Walentas' application for a permit to operate a ferry service across the East River, from the South Street Seaport to Fulton Landing, after he had been told that his proposal had been accepted (JA 323).

Lipper's campaign to sabotage Walentas' development plans extended to the private sector as well. When Lipper became aware that Walentas was negotiating with the Museum of American Folk Art to construct a new museum and office tower, Lipper delivered a copy of the false DOI report to the husband of one of the Museum's trustees. Thereafter, the Museum terminated its agreement with Walentas, offering no reason other than the false DOI report (JA 223-226, 317).

On March 6, 1985, Walentas commenced this action, in the United States District Court for the Southern District of New York. On June 3, 1986, the District Court, in response to Lipper's motion to dismiss the complaint pursuant to *Fed. R. Civ. P.* 12(b)(6), held that Walentas had stated a claim for the invasion of a liberty interest, but not a claim for the deprivation of property. *Waltentas* v. *Lipper* [sic], 636 F.Supp. 331 (S.D.N.Y. 1986) (Appendix F). Shortly thereafter, the District Court certified a question to the Second Circuit pursuant to 28 U.S.C. §1292(b) as to whether Walentas had sufficiently pleaded a claim for the deprivation of liberty; however, the Second Circuit denied Lipper's interlocutory appeal (Appendix D).

Lipper thereafter moved for summary judgment pursuant to *Fed. R. Civ. P.* 56, on the grounds that (1) he had qualified immunity from suit under 42 U.S.C. §1983; and (2) he did not violate any liberty interest. On June 17, 1987, the District Court granted the motion on the first ground, and dismissed the complaint in its entirety. *Walentas* v. *Lipper*, 662 F.Supp. 902 (S.D.N.Y. 1987) (Appendix C). On November 25, 1988, one year after oral argument was held in the Second Circuit before Judges Mahoney, Winter and Van Graafeiland, the panel issued its opinion (Appendix A).

The Second Circuit affirmed the judgment of the United States District Court for the Southern District of New York, granting Lipper's motion for summary judgment on the ground that Lipper was entitled to qualified immunity from suit. The court reasoned that Walentas' occupational liberty interest was not so "clearly established" in 1984 as to put Lipper on notice that his conduct as a government official was unlawful. The Second Circuit also affirmed the District Court's dismissal of the property claim.

Walentas contends that the Second Circuit applied an unduly restrictive analysis to the test for qualified immunity enunciated by this Court in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) and its progeny. First, the court narrowly defined the liberty and property rights that Walentas alleged had been violated. Second, the court demanded a high degree of factual correspondence between the facts of this case and the facts of the cases that the Second Circuit deemed were analogous. Third, the court refused to consider the "objective legal reasonableness" of Lipper's conduct independently without reference to prior decisional law.

Walentas argues that the Second Circuit's excessively narrow view of clearly established law was not mandated by this Court's qualified immunity decisions, and is in conflict with the decisions of most other circuits. Furthermore, Walentas argues that this is an issue of national importance because an immunity standard which is overly-protective of government officials seriously dilutes the Congressional purpose of 42 U.S.C. §1983 as an avenue for the vindication of constitutional rights.

REASONS FOR GRANTING THE WRIT

I

THE SECOND CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF THIS COURT BECAUSE IT SUSTAINED A CLAIM FOR QUALIFIED IMMUNITY WITHOUT CONSIDERING THE OBJECTIVE LEGAL REASONABLENESS OF RESPONDENT'S CONDUCT

The Second Circuit narrowly focused its inquiry on whether Walentas' constitutional rights had been "clearly established" or "sufficiently particularized" in 1984 so as to put Lipper on notice that his actions against Walentas were unlawful. Although the court assumed the truth of the allegations that Lipper had used his public office to wage a private vendetta against Walentas, the court refused to consider the objective legal reasonableness of Lipper's conduct. According to the Second Circuit, the presence or absence of analogous case law is the only yardstick by which to measure the reasonableness of official conduct. (Appendix A, pp. 20-21).

The Second Circuit's interpretation of the qualified immunity defense is contrary to the decisions of this Court, which have consistently held that the degree to which a constitutional right has been clearly established is not the sole criterion by which a government official's behavior must be judged.

In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), this Court redefined the standard for qualified immunity by eliminating any inquiry into a government official's subjective intent, and restricting the test to objective factors. The Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. However, the Court stated that:

> "By defining the limits of qualified immunity essentially in objective terms, *we provide no license to lawless conduct*. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the *objective legal reasonableness* of an official's act." (Emphasis added.) 457 U.S. at 819.

This Court never held in *Harlow*, nor any subsequent qualified immunity decision, that a prior case involving identical circumstances is necessary in order for the law to have been clearly established at the time of the challenged conduct. In fact, in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), this Court expressly rejected that position. In *Mitchell*, the Court held that the United States Attorney General was entitled to qualified immunity, because it was not clearly established in 1970, that a warrantless wiretap conducted for the purpose of domestic security was unconstitutional. However, in footnote 12, the Court added the following warning:

> "We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement *has never explicitly been held to apply to a search conducted in identical circumstances*. But in cases where there is a *legitimate question* whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law." (Emphasis added.) 472 U.S. at 535, n.12.

Similarly, in *Malley* v. *Briggs*, 475 U.S. 335 (1986), this Court emphasized that the relevant inquiry is not whether a particular right was clearly established by pre-existing case law, but whether the conduct allegedly violating that right was objectively reasonable. In *Malley*, this Court remanded the case for a determination on the reasonableness of a police officer's request for a warrant. In holding that immunity should be

recognized only if reasonably competent officers could disagree on the issue of probable cause, this Court observed that the defense of qualified immunity was never intended to protect "the plainly incompetent or those who knowingly violate the law." 475 U.S. at 341.

Again, in *Anderson* v. *Creighton*, 483 U.S. ____, 97 L.Ed.2d 523 (1987), this Court held that the paramount issue is the "objective (albeit fact-specific) question whether a reasonable officer could have believed [the officer's] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." 97 L.Ed.2d at 532. The Court expressly stated:

> "It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was *objectively legally unreasonable*." (Emphasis added.) 97 L.Ed.2d at 531.

Thus it is clear from *Harlow*, *Mitchell*, *Malley* and *Anderson*, that the extent to which a right has been clearly established by decisional law, is only one factor to be considered in determining whether the conduct complained of is objectively reasonable and therefore shielded by government immunity. Moreover, *Harlow* and its progeny by no means eliminated the requirement that public officers perform their duties reasonably, and in good faith. In fact, the term "qualified immunity" is often used interchangeably with "good faith immunity" throughout this Court's opinions.

Lipper's intentional and malicious actions to sabotage Walentas' real estate development plans were the equivalent of an "economic crime," and were not the sort of government action that the defense of immunity was designed to protect. Nevertheless, the Second Circuit ignored the record, which was replete

with evidence of Lipper's malice and lack of good faith, and refused to consider whether Lipper's conduct was reasonable in the absence of a case holding a government official liable for damages in identical circumstances.

In essence, the Second Circuit's decision stands for the proposition that all actions by government officials are reasonable, unless there is a prior case holding otherwise. Such a drastic deviation from this Court's qualified immunity precedents should be overturned.

II

THE SECOND CIRCUIT'S RESTRICTIVE DEFINITION OF CLEARLY ESTABLISHED LAW CONFLICTS WITH THE QUALIFIED IMMUNITY DECISIONS OF MOST OF THE OTHER CIRCUIT COURTS

A. *The Second Circuit Overlooked Closely Analogous Cases Which Clearly Established Petitioner's Liberty Interest*

Not only did the Second Circuit refuse to consider the objective legal reasonableness of Lipper's conduct, but the court also defined Walentas' liberty and property interests so narrowly, as to make it virtually impossible to find that those rights were clearly established. As a result, Lipper's immunity from liability turned on the Second Circuit's insistence on a high degree of factual congruity between pre-existing case law and the facts of this case.

Indeed, the Second Circuit's restrictive treatment of analogous case law was even more stringent than the approach adopted by the District Court below. The District Court had narrowly focused its inquiry on "whether it was clearly established in 1984 that public defamation of one seeking state employment (but not yet having obtained it), which impairs his chances for other

employment, violates his constitutional right to liberty . . . ." Judge Stanton concluded that because there was only one district court case (*Doe* v. *United States Civil Service Commission*, 483 F.Supp. 539 (S.D.N.Y. 1980)) which extended the principle of occupational liberty to a pre-employment context, the law was not so clearly established as to put Lipper on notice that his conduct was unlawful. According to the District Court, Lipper was entitled to immunity because "[t]he legal principle that a stigmatizing denial of a government job or contract deprives an individual of his occupational liberty is 'a nonobvious implication of the due process clause. . . .' " 662 F.Supp. at 904 (quoting *Colaizzi* v. *Walker*, 812 F.2d 304, 308 (7th Cir. 1987)).

The Second Circuit not only agreed with this analysis, but went one step further. In footnote 3 of his opinion, Judge Mahoney mentions two cases which he noted were not cited by the District Court or the parties: *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984) and *Larry* v. *Lawler*, 605 F.2d 954 (7th Cir. 1978). Nevertheless, Judge Mahoney concluded, "[w]e do not regard these cases, in combination with *Doe*, as clearly establishing the right for which Walentas contends in January - March, 1984 [sic]." (Appendix A, p. 19). Assuming *arguendo* that Walentas had a protected liberty interest, the Second Circuit nevertheless concurred with the District Court's view that "Lipper enjoyed a qualified immunity which precludes liability on his part for the invasion of that interest. . . ." (Appendix A, p. 17).

The Second Circuit reached that conclusion despite the fact that *Larry*, *Bartel* and *Doe* clearly established that the deprivation of a liberty interest occurs where there has been a stigmatizing denial of a government job, and a foreclosure from other employment opportunities.[4]

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[4] In *Doe*, the plaintiff's application for a White House fellowship was denied because of a report that she was a petty thief and a kleptomaniac. The District

(Footnote continued)

Like the plaintiffs in *Larry*, *Bartel* and *Doe*, Walentas suffered damage to his professional reputation and the foreclosure from a government project, as well as other employment opportunities, as a result of Lipper's defamatory comments and the false DOI report which Lipper engineered and distributed to the press. Also, like those plaintiffs, Walentas was never given an opportunity to refute the false charges against him.

In the course of rejecting these three closely analogous cases, the Second Circuit also rejected Walentas' reliance on the Supreme Court precedents set forth in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Paul* v. *Davis*, 424 U.S. 693 (1976). These two cases established that a liberty interest is violated where government action imposes a stigma or injury to an individual's reputation, *and* there is an alteration in that person's legal status.

Similarly, the Second Circuit ignored a long line of closely analogous cases cited by Walentas which applied the same "stigma plus" test to situations where a stigmatizing government defamation has an immediate and tangible effect on a corporation's ability to do business. *Conset Corp.* v. *Community Service Administration*, 655 F.2d 1291 (D.C. Cir. 1981); *Old Dominion Dairy Products, Inc.* v. *Sec'y. of Defense*, 631 F.2d 953 (D.C. Cir. 1980); *Myers & Myers, Inc.* v. *U.S. Postal Service*, 527 F.2d 1252 (2d Cir. 1975); and *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964).

While in some cases it might be difficult to define what constitutes a sufficiently particularized or clearly established right,

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Court held that the investigating agency had unconstitutionally deprived the plaintiff of a liberty interest by disclosing the allegations to the Fellowship Commission without affording her an opportunity to refute the charges. Likewise in *Larry*, the Seventh Circuit held that a Civil Service Commission negative eligibility finding which barred the plaintiff from federal employment for three years infringed a protectible liberty interest. In *Bartel*, the FAA's refusal to rehire an air safety inspector at a job level commensurate with his experience, on the basis of an unsubstantiated report, was deemed to be a compensable due process violation.

in the present case the liberty interest asserted was one that the Supreme Court has long recognized as fundamental. As far back as 1915, this Court stated in *Truax* v. *Raich*, 239 U.S. 33, 41 (1915), "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *See also*, *Examining Board* v. *Flores de Otero*, 426 U.S. 572 (1976); *In Re Griffiths*, 413 U.S. 717 (1973); *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963); *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). Although framed in terms of Equal Protection, these cases all firmly uphold the right of an individual to pursue his chosen profession without unreasonable government interference.

Finally, the Second Circuit ignored a case directly on point from its own circuit — *Burt* v. *City of New York*, 156 F.2d 791 (2d Cir. 1946). In *Burt*, Judge Learned Hand held, on the authority of *Snowden* v. *Hughes*, 321 U.S. 1 (1944), that where a New York City official had engaged in purposeful discrimination "actuated by personal hostility," and had routinely refused to approve plans submitted by the plaintiff to the Department of Buildings, a claim under the predecessor of 42 U.S.C. §1983 had been stated.[5]

The facts at bar closely parallel those in *Burt*. In each case, officials of the City of New York were asserted to have acted

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[5] See also, *Sullivan* v. *Town of Salem*, 805 F.2d 81 (2d Cir. 1986) (chairman of planning and zoning commission could be held personally liable for refusing for personal business reasons to issue certificates of occupancy to homes built by a competitor); *Bateson* v. *Geisse*, 857 F.2d 1300 (9th Cir. 1988) (public officials who arbitrarily and capriciously denied building permits to plaintiff, were not entitled to qualified immunity because their actions violated clearly established law and were not objectively legally reasonable); and *Rodriguez* v. *Village of Larchmont*, 608 F.Supp. 467 (S.D.N.Y. 1985) (court held, relying on *Burt*, that plaintiff could prevail on a claim for denial of municipal services if it were shown that he was the victim of purposeful discrimination actuated by personal hostility).

maliciously, so as to impose unlawful and oppressive conditions upon the plaintiff, and to have abused their power in a discriminatory fashion, so as to effectively prevent the plaintiff from earning his livelihood. The circumstance that in *Burt*, the officials prevented an architect from filing plans with the Building Department, whereas here, a Deputy Mayor prevented a real estate entrepreneur from being designated as the developer of government property, prevented him from getting loans and tax reductions, disparaged him publicly, and interfered with his business in other ways, does not distinguish the cases at all. Walentas had as much right as the plaintiffs in *Burt* and the other cases cited above, to be free from unlawful, discriminatory actions actuated by personal hostility, and calculated to destroy his business and prevent him from earning a livelihood.

The Second Circuit's insistence on a factually identical case virtually nullified the constitutional rights clearly established by the cases discussed above. The court's ruling thereby breathed life into the warning delivered by Judge MacKinnon in *Zweibon* v. *Mitchell*, 720 F.2d 162, 173 (D.C. Cir. 1983) about "the consequences that might attend a too niggardly definition of what constitutes 'clearly established' law." Judge MacKinnon admonished that impermissible conduct should not "be excused by the drawing of trivial factual distinctions." *Id.*

B. *The Second Circuit's Insistence Upon A Factually Identical Case Conflicts With The Flexible Approach To Clearly Established Law Adopted By Other Circuits*

In contrast to the Second Circuit's restrictive analysis, other circuit courts have adopted a more flexible approach to determine whether a clearly established constitutional right has been violated. These courts demand less factual correspondence between the "establishing" law and the case under consideration, and recognize a duty on the part of defendant-officials to apply general legal principles to specific factual situations.

The D.C. Circuit

For example, one of the most frequently cited cases on the issue of qualified immunity is *Hobson* v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied sub nom. Brennan* v. *Hobson*, 470 U.S. 1084 (1985). In *Hobson*, the plaintiffs were political activists who were engaged in the 'anti-war' and 'civil-rights' movements of the 1960's, and who were subjected to efforts by the FBI to disrupt and discredit their organizations.

The plaintiffs brought an action under 42 U.S.C. §1985, claiming that they were the victims of several police and FBI conspiracies in violation of their First Amendment rights. The D.C. Circuit ruled that the government officials were not entitled to immunity. The court recognized that "the extraordinary nature of these charges makes this an easy case," and on the facts of this case, "broad parameters suffice, because the illegality of the conduct alleged was well-established 'by any reasonable definition of the phrase.' " *Id.* at 26 (quoting *Zweibon* v. *Mitchell*, 720 F.2d 162, 169 (D.C. Cir. 1983)).

Citing a line of Supreme Court cases dating back to 1876, the D.C. Circuit reasoned that the "existence of a First Amendment right of association for lawful purposes was beyond dispute and its *broad contours* were quite clear" (emphasis added) *Id.* The court concluded that these principles left no doubt that the government's actions, taken with the intent to disrupt or destroy lawful organization, or to deter membership in those groups was "absolutely unconstitutional." Finally, the court observed:

> "In such circumstances, to require a prior Supreme Court holding on the particular facts of this case would not only immunize but actually reward the Government for inventing and pursuing ever more egregious conduct. Indeed, there never could be such a ruling from the Court, because *Harlow* would always immunize the Government actors. Simply put, where it is apparent that less direct, and facially

> legitimate intrusions on plaintiffs' rights violate the Constitution, it is beyond question that sweeping intentional intrusions do so as well." *Id.* at 29.

As in *Hobson*, the challenged conduct here was clearly unconstitutional. It is hardly a novel proposition of constitutional law that a Deputy Mayor may not use the power of his office to conduct a personal vendetta against a private citizen. Not only is this proposition apparent to every reasonable government official, but it is well known to every American school child as well.

The Fifth Circuit

The Fifth Circuit has also demonstrated a more flexible approach, and has often looked beyond the existence of factually similar case law to determine whether a constitutional right is clearly established. For instance, in *Jefferson* v. *Yselta Independent School District*, 817 F.2d 303 (5th Cir. 1987), the plaintiff was a public school girl who had been tied to a chair by her teacher for one school day and part of the next, without access to the bathroom. In rejecting the teacher's immunity claim, the Fifth Circuit concluded that a competent teacher should have known that such conduct was "constitutionally impermissible," even though there was no decisional law which covered these particular facts.[6] The court reasoned as follows:

[6] Faced with similar circumstances of abuse, other circuits have looked for objectively reasonable conduct rather than a case on point. *See also*, *Garcia* v. *Miera*, 817 F.2d 650, 658 (10th Cir. 1987) ("We think a reasonably competent legal advisor to a school district should have realized that egregious invasions of a student's personal security would be unconstitutional."); *Doe* v. *Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980) *cert. denied* 451 U.S. 1022 (1981) ("It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude."); and *Stoneking* v. *Bradford Area School District*, 856 F.2d 594 (3rd Cir. 1988).

> "In determining what a reasonable teacher should know in this instance, it is not necessary to point to a precedent on all-fours with the case at bar. It suffices that the teacher be aware of general, well-developed legal principles." *Id.* at 305.

Another leading Fifth Circuit case is *Lynch* v. *Cannatella*, 810 F.2d 1363 (5th Cir. 1987). In *Lynch*, stowaways, after being discovered aboard a barge, were detained and allegedly mistreated by harbor police before being deported. In particular, they claimed that they were shackled, beaten, drugged and fire-hosed by the harbor police. The Fifth Circuit rejected the argument that the harbor police were entitled to immunity because aliens are not "persons" entitled to constitutional protection and reasoned as follows:

> "It does not require a court ruling for a state official to know that even an excludable alien may not be denied the fundamental liberty interest to be free of gross physical abuse in the absence of some articulable, rational public interest that may be advanced by such conduct." *Id.* at 1375.

Private citizens like Walentas, who have suffered economic abuse of constitutional magnitude at the hands of unscrupulous government officials, are no less deserving of the judicial remedies provided by 42 U.S.C. §1983 than the victims described in the cases above. In fact, several circuit courts have rejected immunity claims where they have found a pattern of harassment aimed at destroying a person's business. *See e.g.*, *Turner* v. *Dammon*, 848 F.2d 440 (4th Cir. 1988) (state police officers were not entitled to immunity where they conducted over one hundred warrantless searches of a topless bar); and *McGee* v. *Hester*, 724 F.2d 89 (8th Cir. 1984) (officers were not entitled to immunity where there was evidence that prolonged surveillance of plaintiffs' liquor store was intended to discourage customers).

The Third Circuit

The Third Circuit has also embraced a more flexible approach to determining clearly established law. The leading case in that circuit is *People of Three Mile Island* v. *Nuclear Regulatory Commissioners*, 747 F.2d 139 (3rd Cir. 1984) where, in dicta, the court articulated an approach which was echoed in subsequent Third Circuit opinions and cited in other circuit court decisions as well.[7]

After reviewing the standards applied by the various circuits, the Third Circuit adopted an approach which it described as follows:

> "We adopt the second approach — requiring some but not precise factual correspondence and demanding that officials apply general, well developed legal principles. Such a formulation of the law better strikes the balance between the competing interests that the Supreme Court identified when it fashioned the contours of executive immunity. While we cannot expect executive officials to anticipate the evolution of constitutional law, neither can we be faithful to the purposes of immunity by permitting such officials one liability-free violation of a constitutional or statutory requirement. Insisting on a precise factual correspondence between the conduct at issue and reported case law is tantamount to such a license, see *Hixon* v. *Durbin*, 560 F.Supp. 654, 665 (E.D. Pa. 1983). Moreover, requiring officials to consider the legal implications of their actions should have a salutary effect." 747 F.2d at 144-145.

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[7] The Third Circuit applied this standard in *Sourbeer* v. *Robinson*, 791 F.2d 1094 (3rd Cir. 1986), and *Hicks* v. *Feeney*, 770 F.2d 375 (3rd Cir. 1985).

The Ninth Circuit

The broadest standard applied to the question of clearly settled law was expressed by the Ninth Circuit in *Capoeman* v. *Reed*, 754 F.2d 1512 (9th Cir. 1985). In *Capoeman*, an American Indian objected to a prison haircut on religious grounds. Although the court held that the prison officials were immune from damages because the law was not clearly established, in dicta that is often cited in the Ninth and other circuits,[8] the court offered this analysis:

> "Where, as here, there are relatively few cases on point, and none of them are binding, an additional factor that may be considered in ascertaining whether the law is 'clearly established' is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as courts which had previously considered the issue. To make the determination, we examine the legal analysis employed by those courts and compare it to the analysis being used at that time by the Ninth Circuit in related but factually different situations." 754 F.2d at 1515.

Thus, the Second Circuit created a rule for determining clearly settled law that is in conflict with the more flexible approaches adopted by the Third, Fifth, Ninth, and D.C. Circuits. In contrast to the Second Circuit, these circuit courts have recognized that while closely analogous case law is relevant, precise factual congruity cannot be expected, nor is it necessary.

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[8] *Capoeman* is cited with approval in *Gutierrez* v. *Municipal Court*, 838 F.2d 1031, 1048 (9th Cir. 1988), and *Tribble* v. *Gardner*, 860 F.2d 321, 324 (9th Cir. 1988).

III

THE SECOND CIRCUIT'S QUALIFIED IMMUNITY RULING IN THIS CASE RAISES UNRESOLVED QUESTIONS OF NATIONAL IMPORTANCE

The Second Circuit's qualified immunity analysis in this case has created a confusing precedent, and is likely to generate further confusion among the other circuits. The problem can be alleviated if this Court squarely addresses the question of what constitutes "clearly established law." Under *Harlow*, whether a defendant is entitled to immunity depends upon a court's threshold determination as to whether a reasonable government official should have known that he was violating clearly established law. However, the Court left open and has never subsequently resolved, the critical question of how to determine what law is clearly established.

In fact, in a footnote immediately following the crafting of the new test in *Harlow*, this Court declared "we need not define here the circumstances under which 'the state of the law is evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court. . .' " *Id.* at 818, n. 32 (quoting *Procunier* v. *Navarette*, 434 U.S. 555, 565 (1978)).

In the absence of guidance from this Court, the lower courts have been grappling with the problem of how to create a formula for identifying "clearly established law." For instance, in *Hobson* v. *Wilson*, *supra*, the D.C. Circuit expressed its frustration as follows:

> "Our task, in applying *Harlow*, is to measure the constitutionality of the acts alleged in this action by reference to clearly established rights at the time the acts occurred. At first blush, the task as so stated appears simple and straightforward. *A moment of reflection, however, reveals various uncertainties in the*

> *Harlow decision and exposes a test of some imprecision. It is not clear, for example, how a court should determine well-established rights* . . . ." (Emphasis added). 737 F.2d at 25.

Similarly, the Sixth Circuit noted in *Robinson* v. *Bibb*, 840 F.2d 349, 351 (6th Cir. 1988), "we have had no specific Supreme Court guidance in deciding when an issue becomes clearly established."

In their effort to define what violations of clearly established law are actionable, the lower courts have encountered two major areas of difficulty. First, there is the question of whether decisional law is the only criteria by which the constitutionality of government conduct can be measured. The second difficulty is determining the extent of factual correspondence required between the applicable precedents and the case at bar.

The importance of resolving these issues should not be underestimated. In cases involving ambiguous or uncharted areas of law, the approach that a particular court takes to the issue of "clearly established law" may be dispositive of the plaintiff's claim under 42 U.S.C. §1983. As some commentators have observed, an objective test which relies on the uncertain nature of the law works to the advantage of public officials, and to the disadvantage of plaintiffs. An overly restrictive approach, such as the one adopted by the Second Circuit, results in the underprotection of valuable constitutional rights.[9]

The danger of such a rigid analysis is that if a court narrowly defines the applicable law as unsettled and if the fact pattern

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[9] *See, Comment, Harlow* v. *Fitzgerald: The Lower Courts Implement The New Standard For Qualified Immunity Under Section 1983*, 132 U. Pa. L. Rev. 901 (1984) (discussing the difficulty courts have had in following *Harlow*); and Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 Wash. U.L.Q. 221 (1984) (discussing the danger of a restrictive application of clearly settled law).

is unique, then no matter how egregious the conduct, the defense of qualified immunity is automatically transformed into one of absolute immunity. Under this restrictive view of "clearly established law," the deprivation of a constitutional right will never be reviewed on the merits, will never be held unconstitutional, and will never be "sufficiently particularized" to prevent further violations. This is because all such cases will be dismissed on qualified immunity grounds before a decision on the merits can be reached.

As this Court noted in *Harlow*, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for the vindication of constitutional guarantees." 457 U.S. at 814 [*citing*, *Butz* v. *Economou*, 438 U.S. 478, 506 (1978), and *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 410 (1971) ("For people in Bivens' shoes, it is damages or nothing")].

The Second Circuit's restrictive reading of *Harlow* and its progeny, jeopardizes the compensatory, punitive and deterrent values served by 42 U.S.C. §1983. The court's narrow definition of clearly established law will leave many plaintiffs without redress for their injuries, and will endanger the public interest by increasing the probability that deliberate wrongs will go unpunished.

The extension of immunity to Lipper in this case opens the door to other blatant abuses on the part of unscrupulous or irresponsible government officials. What is at stake is the maintenance of high standards of conduct among public servants. This case presents the ideal opportunity for this Court to clarify some of the important questions which pervade this vital area of the law.

CONCLUSION

For the reasons set forth above, this petition for certiorari should be granted.

Dated: New York, New York
February 22, 1989

Respectfully submitted,

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APPENDIX

APPENDIX

A. Opinion of the United States Court of Appeals for the Second Circuit, dated November 25, 1988.

B. Judgment of the United States District Court for the Southern District of New York, dated June 22, 1987.

C. Opinion and Order of the United States District for the Southern District of New York, dated June 17, 1987.

D. Order of the United States Court of Appeals for the Second Circuit, dated August 12, 1986.

E. Order of the United States District Court for the Southern District of New York, dated July 3, 1986.

F. Opinion of the United States District Court for the Southern District of New York, dated June 3, 1986.

G. Constitutional and Statutory Provisions.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 384—August Term, 1987

(Argued: November 24, 1987

Decided: November 25, 1988)

Docket No. 87-7570

DAVID C. WALENTAS,

Plaintiff-Appellant,

—v.—

KENNETH LIPPER, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, and JOHN DOE #5,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, WINTER and MAHONEY,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, granting defendant-appellee Kenneth Lipper's motion for summary judgment on the ground that he

was entitled to qualified immunity from suit in this action brought pursuant to 42 U.S.C. § 1983 (1982). This appeal also brings before us a prior order of the district court which dismissed plaintiff-appellant's section 1983 complaint with respect to an alleged deprivation of a property interest without due process of law.

Affirmed. Judge Van Graafeiland concurs in a separate opinion.

RICHARD S. FISCHBEIN, New York, New York (Kenneth G. Schwarz, Deborah J. Locitzer, Fischbein Badillo Schwarz Wiener Gruskin & Lederman, New York, New York, of counsel), *for Plaintiff-Appellant*.

ELIZABETH DVORKIN, Assistant Corporation Counsel for the City of New York, New York, New York (Peter Zimroth, Corporation Counsel for the City of New York, Jeffrey Schonback, Edward F. X. Hart, Assistant Corporation Counsels, New York, New York, of counsel), *for Defendants-Appellees*.

MAHONEY, *Circuit Judge*:

Plaintiff-appellant David C. Walentas appeals from a judgment of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge*, granting defendant-appellee Kenneth Lipper's motion for

summary judgment, *see* Fed. R. Civ. P. 56, on the ground that Lipper is entitled to qualified immunity from suit in this action brought pursuant to 42 U.S.C. § 1983 (1982). Walentas also appeals from an earlier order of the district court which dismissed his complaint, *see* Fed. R. Civ. P. 12(b)(6), to the extent that it alleged a deprivation of a property interest without due process of law.

We affirm.

I. BACKGROUND

Given the procedural posture in which this appeal comes to us, we assume the truth of plaintiff's allegations, *see United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Hawkins v. Steingut*, 829 F.2d 317, 319 (2d Cir. 1987); *Luce v. Edelstein*, 802 F.2d 49, 52 (2d Cir. 1986), upon which this statement of the case's background is substantially based.

Plaintiff-appellant David C. Walentas is a prominent New York real estate developer. During the late 1970s, Walentas realized the development potential of certain property on the Brooklyn waterfront located between the Brooklyn and Manhattan bridges. At that time the area, commonly known as the Fulton Ferry landing, was a bleak stretch of land consisting of industrial buildings, abandoned warehouses and rotting piers.

Despite the general disrepair of the neighborhood, Walentas was convinced that the area could be revitalized and imitate the success enjoyed by the South Street Seaport, a once similarly blighted area less than a mile away across the East River in Manhattan. He accordingly began to purchase properties in the vicinity in 1981, ultimately acquiring over two million square feet in the area

(described by appellant as the "Brooklake properties" because acquired by Brooklake Associates, a New York limited partnership which served as the acquiring entity).

Immediately adjacent to the Brooklake properties were several parcels of land, comprising approximately fifteen acres which were owned in part by the City of New York and in part by the State of New York and contained a number of historically significant properties, albeit in a state of disrepair. On June 3, 1981, the New York City Public Development Corporation ("PDC"), the New York State Urban Development Corporation ("UDC") and the New York State Office of Parks, Recreation and Historic Preservation ("OPRHP"), the agencies charged with overseeing the property (collectively the "Agencies"), jointly issued a Solicitation For Development Proposal (the "SDP") in an effort to secure a developer who would undertake the project of revitalizing these parcels (the "SDP Site").

The SDP, which set forth the conditions under which a developer for the SDP site would be chosen, stated that the designation of a developer was to take place in two phases. Initially, one or more developers were to be conditionally designated, based upon initial proposals which would include preliminary development and financial plans together with statements of the applicants' development experience and financial background. Thereafter, the developer or developers selected for further consideration would submit more detailed information concerning its or their proposals, particularly with respect to financial, management and development plans. The final selection of a developer would then be made upon the basis of this information.

On May 27, 1982, Walentas, under the trade name Two Trees Management Co., was conditionally designated as the developer of the SDP Site, and accordingly entered into a conditional designation agreement (the "Agreement") with the Agencies. The Agreement gave Walentas the exclusive right to negotiate and thereafter execute a memorandum of intent with the Agencies to be named the final developer of the project. The Agreement had a term of six months, but the Agencies had a unilateral right to extend that period "for continuing negotiations." In fact, the Agreement was once formally extended by the Agencies, and was thereafter informally extended until approximately March, 1984. In addition, the Agreement provided that "the [Agencies] may terminate the negotiations at any time if, in their sole discretion, they are not satisfied with the progress of negotiation or if you [Walentas] fail to satisfy any of the other conditions set forth in [the Agreement]." The Agreement obliged Walentas, *inter alia*, to provide preliminary plans and construction documents with respect to the project, as well as commitments for necessary financing.

As the project proceeded, Walentas obtained from the New York City Board of Estimate approval of an application for a federal Urban Development Action Grant which would have provided up to $20 million in financial assistance to develop the SDP Site. In September, 1983, Walentas submitted a draft Uniform Land Use Review Program application to the City. By the end of that month, the PDC and UDC had reached an agreement with Walentas regarding the physical alterations to be accomplished by Walentas on the waterfront portion of the SDP Site. In September, 1983, Walentas submitted to the New York Industrial and Commerce Incentive Board (the "ICIB") an application for tax reductions for his adjoin-

ing Brooklake properties that would have resulted in savings of approximately $12 million over a twenty year period On October 7, 1983, Walentas reached agreement with the PDC and UDC on the budget for the development of the SDP Site. On November 21, 1983, he submitted an application to the New York Industrial Development Authority for a low interest loan to finance the construction of automobile parking garages at the SDP Site. In or about December, 1983, Lehman Brothers Kuhn Loeb ("Lehman Brothers"), a major investment banking concern, agreed to a lease of a portion of the building known as 1 Main Street which was a part of the Brooklake properties, the finalization of which was dependent upon favorable action by the ICIB upon Walentas' application for tax relief.

Defendant Kenneth Lipper was the Deputy Mayor for Finance and Economic Development of the City of New York from January, 1983 until March, 1985. In his capacity as Deputy Mayor, Lipper oversaw the Office of Economic Development, of which the PDC is a component. Prior to his appointment as Deputy Mayor, Lipper had been an investor in two real estate ventures organized and managed by Walentas. During the time the two were partners, Lipper became dissatisfied with the manner in which Walentas managed the ventures. Lipper also blamed Walentas for the suicide of Lipper's friend, J. Frederick Byers III, who was also a partner in Walentas' real estate ventures. Walentas alleges that Lipper had thus developed a personal animosity towards Walentas, as a result of which Lipper used his official powers as Deputy Mayor during early 1984 to interfere with Walentas' development of the SDP Site, culminating in the eventual de-designation of Walentas as the developer of the project.

In this connection, Walentas claims that Lipper engaged in the following acts of wrongdoing: (1) Lipper directed the president of PDC to impose additional burdensome restrictions on Walentas, such as finding a new partner who could guarantee financing of the entire project or obtaining an unconditional financing commitment from an institution, and identifying a construction firm of adequate size to handle the project, to be satisfied in less than two months, failing which the city would "automatically terminate all further consideration of [Walentas] as a developer for this site"; (2) at the same time, Lipper "made it known" to potential partners of Walentas that the city would "view [them] with extreme disfavor" if they agreed to join plaintiff in the development of the SDP Site; (3) Lipper, as chairman of the ICIB, repeatedly delayed consideration of Walentas' application to the ICIB for tax relief, which resulted in Lehman Brothers' declining to reach a formal lease agreement with plaintiff; plaintiff was eventually told that the application would be denied; (4) Lipper knowingly gave Councilwoman Ruth Messinger false and disparaging information about plaintiff which, in February, 1984, Councilwoman Messinger disseminated to the public in a press conference; (5) publicly stating that he would forward Councilwoman Messinger's allegations to the New York City Department of Investigations and actually doing so, Lipper directed the Commissioner of Investigations to issue a report confirming the allegations irrespective of their truth or falsity; (6) when the Department of Investigations did issue that report in March, 1984, Lipper, knowing the report to be false, distributed copies to the press; (7) in February, 1984, Lipper told a *Daily News* reporter, without first consulting either UDC or OPRHP, that plaintiff would not be the developer of the SDP Site; (8) on March 5, 1984, Lipper

held a press conference, without consulting either UDC or OPRHP, during which he made false and disparaging remarks about Walentas and formally de-designated Walentas as developer of the site; and (9) on the same day, the president of PDC wrote Walentas a letter, at the direction of Lipper, informing Walentas that he had been de-designated as developer. *See Walentas v. Lipper*, 636 F. Supp. 331, 333-34 (S.D.N.Y. 1986).

Walentas commenced the instant litigation on March 4, 1985, alleging that Lipper, acting under color of state law, had deprived Walentas of rights secured to Walentas by the federal Constitution, in violation of 42 U.S.C. § 1983 (1982). On June 25, 1985, Lipper moved to dismiss the complaint for failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6).

On June 3, 1986, the district court issued an order dismissing the complaint insofar as it alleged a property interest in both "good faith consideration" of Walentas' application to become the developer of the SDP Site and an "expectation" that if Walentas complied with the terms of the Agreement, he would be selected as developer of the SDP Site. *See Walentas*, 636 F. Supp. at 334-36. The district court did not dismiss, however, Walentas' claim that he had been deprived of a protected liberty interest as a result of Lipper's defamation of Walentas occurring in connection with the announcement of Walentas' de-designation as developer of the SDP Site. *Id.* at 336-38.

Shortly thereafter, the district court certified to this court, pursuant to 28 U.S.C. § 1292(b) (1982), the question whether Walentas sufficiently pleaded a section 1983 claim for deprivation of a liberty interest. However, we denied Lipper's consequent application for an interlocu-

tory appeal on that issue. Lipper thereafter moved for summary judgment on the grounds that (1) he had qualified immunity from suit under section 1983 which required dismissal, since the state of the law was such in 1984 that Lipper did not violate clearly established statutory or constitutional rights of Walentas of which a reasonable person would have known; and (2) in any event, he had not violated any liberty interest of Walentas. On June 17, 1987, the district court granted the motion on the first ground and dismissed Walentas' complaint in its entirety. *Walentas v. Lipper*, 662 F. Supp. 902 (S.D.N.Y. 1987).

Walentas appeals from the resulting final judgment of the district court dismissing his complaint, which brings before us as well the prior order partially dismissing the complaint. *In Re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179, 181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2898 (1988); *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

II. DISCUSSION

We accordingly consider *seriatim* Walentas' claims that a section 1983 violation occurred because Lipper, acting under color of state law, deprived Walentas of a constitutional (1) property interest and (2) liberty interest, and (3) was not excused by a qualified immunity under the doctrine of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

A. *Property Interest.*

To state a claim under 42 U.S.C. § 1983 (1982), Walentas' "complaint must allege that the defendant deprived [him] of a right secured by the Constitution or laws of the United States and that such deprivation was committed by

persons acting under color of state law." *Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2d Cir. 1987) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Dwyer v. Regan*, 777 F.2d 825, 828 (2d Cir. 1985), *modified*, 793 F.2d 457 (2d Cir. 1986)). The range of interests protected by section 1983 is limited. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577.

Moreover, while entitlement to protected benefits may be conferred by statute or by contract, *see S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 966 (2d Cir. 1988), it is relatively clear that a contract dispute, in and of itself, is not sufficient to give rise to a cause of action under section 1983 *Id.*; *Costello*, 811 F.2d at 784. There is a distinction between the breach of an ordinary contract right and the deprivation of a protectible property interest within the meaning of the due process clause. *See Brown v. Brienen*, 722 F.2d 360, 363-65 (7th Cir. 1983). In this connection, the Supreme Court has held that the term property does include an expectation of continued employment based upon a contract. *Roth*, 408 U.S. at 576-77; *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972). In so holding, however, the Court has carefully limited the rule to situations which involve contracts with tenure provisions and the like, or where a clearly implied promise of continued employment has been made. *Perry*, 408 U.S. at 601-02; *S & D Maintenance*, 844 F.2d a 966-67; *see Goetz v. Windsor Cent. School Dist.*, 698 F.2d 606, 608-09 (2d Cir. 1983).

Courts have accordingly been wary of the consequences that might arise if section 1983 were expanded to encom-

pass substantially all public contract rights. *See Costello*, 811 F.2d at 784; *see also San Bernardino Physicians' Services Medical Group v. County of San Bernardino*, 825 F.2d 1404, 1408-09 (9th Cir. 1987); *Brown*, 722 F.2d at 364. Indeed, as this court has recently stated:

> [T]he doctrinal implications of constitutionalizing all public contract rights would raise substantial concerns, and we seriously doubt that *Roth* and its progeny portend such a result, although we do not reach the issue today. An interest in enforcement of an ordinary commercial contract with a state is qualitatively different from the interests the Supreme Court has thus far viewed as "property" entitled to procedural due process protection . . . [W]e hesitate to extend the doctrine further to constitutionalize contractual interests that are not associated with any cognizable status of the claimant beyond its temporary role as a governmental contractor . . . However the contours of a protectible property interest may be shaped in the future, this case affords no occasion for any extension of existing doctrine because [plaintiff's] contracts do not provide it with entitlements within the traditional understanding of *Roth*.

S & D Maintenance, 844 F.2d at 966-67 (footnotes omitted).

Here, however, as in *S&D Maintenance*, we need not definitively resolve the question whether the contractual rights asserted by Walentas are of the kind protectible under section 1983, because they had not in any event achieved that concreteness of entitlement required by *Roth* and its progeny. This conclusion flows from consideration of the precise nature of the right whose deprivation Walentas claims.

Significantly, Walentas does not claim that he was employed by the city. Rather, he claims that he had a legitimate entitlement that he would be employed by the city *in the future*.[1] From the outset, therefore, Walentas' claim stands on a substantially different (and weaker) ground than the typical entitlement claim. Walentas asserts that the terms of the Agreement specifically guaranteed that he would be named final developer of the project, and that any subsequent administrative procedures and/or requirements that had to be satisfied were mere ministerial acts to be performed by the relevant state and local officials overseeing the project. This contention is without merit.

Walentas seeks to analogize his situation to cases where an applicant's interest in a permit or license has been held to be a constitutionally protected property interest. In such cases, however:

> [T]he question of whether an applicant has a legitimate claim of entitlement to the issuance of a license or certificate should depend on whether, *absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted*. Otherwise the application would amount to a mere unilateral expectancy not ris-

---

1 The district court noted Walentas' claim that he also had a property interest in good faith consideration of his application to become the developer for the SDP Site. *Walentas v. Lipper*, 636 F. Supp. 331, 334 (S.D.N.Y. 1986). The district court agreed with Walentas that there was an implied obligation of good faith and fair dealing on the part of each side to the Agreement. *Id.* at 335; *see Goodstein Constr. Corp. v. City of New York*, 111 A.D.2d 49, 489 N.Y.S.2d 175 (1st Dep't 1985), *aff'd* 67 N.Y.2d 990, 494 N.E.2d 99, 502 N.Y.S.2d 994 (1986); *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983). The district court, however, found that such an obligation "is a contract right, not a property interest," and thus not entitled to section 1983 protection. 636 F. Supp. at 335. We agree with the district court's conclusion on this issue.

> ing to the level of a property right guaranteed against deprivation by the Fourteenth Amendment.

Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 59 (2d Cir. 1985) (emphasis added). Of course, "a theoretical possibility of discretionary action does not automatically classify an application for a license or certificate as a mere 'unilateral hope or expectation.' " *Sullivan v. Town of Salem*, 805 F.2d 81, 85 (2d Cir. 1986). It is nonetheless clear that when an official action is truly discretionary under local law, "one's interest in a favorable decision does not rise to the level of a property right entitled to procedural due process protection." *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1202 (2d Cir.1987) (citations omitted).

Under these standards, Walentas contends that the degree of discretion involved in his final designation was so limited by the terms of the SDP and the Agreement as to give rise to a property interest. This contention is belied, however, both by the language of the Agreement and by local law. The designation of Walentas as developer was clearly "conditional," despite the fact that the Agreement specified Walentas' obligations in some detail. The Agreement could be terminated "at any time" if the Agencies "in their sole discretion" were dissatisfied with the progress of the negotiations. Furthermore, the Agreement was a "memorandum of understanding," which provided that the parties would attempt to negotiate a "memorandum of intent." If those negotiations were successful, the parties would then try to negotiate a contract—a land disposition agreement.

Even assuming that all these negotiations bore fruit, no binding contract could come into existence until the New York City Board of Estimate, in the context of the city's

Uniform Land Use Review Procedure, approved Walentas as the developer. New York City Charter §§ 67(4), 197-c(f) and (i), 384. *See Goodstein Constr. Corp. v. City of New York*, 67 N.Y.2d 990, 992, 494 N.E.2d 99, 100, 502 N.Y.S.2d 994, 995 (1986) (expressing doubt that breach of contract action can be maintained for city's failure to approve a land disposition agreement, since Board of Estimate not bound by prior actions of other city agencies).

This court has recognized that Board of Estimate approval of a development project will be based upon political considerations and the climate of public opinion. *See Citizens Comm. for Faraday Wood v. Lindsay*, 507 F.2d 1065, 1072 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). Thus, execution of a final, binding contract can in no sense be considered ministerial. On the contrary, Walentas' selection as developer would have been a discretionary determination by a political body which, as the district court correctly stated, plaintiff "had no right to expect." *Walentas v. Lipper*, 636 F. Supp. 331, 336 (S.D.N.Y. 1986).

Since Walentas had no legitimate claim of entitlement to be named developer of the project, the district court correctly ruled that Walentas stated no claim against Lipper for deprivation of a constitutionally protected property interest in violation of section 1983.

B. *Liberty Interest.*

Walentas claims that he was also deprived of a protectible liberty interest. He contends that Lipper publicly defamed him, which caused Walentas to lose numerous employment opportunities, especially with respect to government contracts, and that Lipper did so in connection with a denial of public employment to Walentas. Walentas

claims that this scenario brings him within the protection of section 1983 under the applicable precedents.

It is clear that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," *Wisconsin v. Constantineau*, 400 U.S 433, 437 (1971), a protectible liberty interest may be implicated that requires procedural due process in the form of a hearing to clear his name. *Id.* However, damage to one's reputation alone is not enough to implicate due process protections. *Paul v. Davis*, 424 U.S. 693, 701-02 (1976). Rather, something more, such as discharge from governmental employment, must accompany the alleged public defamation. *See id.* at 701 (pertinent precedents do not "establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause").

This court has recently restated the applicable rule:

> A government employee's liberty interest is implicated where the government dismisses him based on charges "that might seriously damage his standing and associations in his community" or that might impose "on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities."

S & D Maintenance, 844 F.2d at 970-71 (quoting *Brandt v. Board of Coop. Educ. Services*, 820 F.2d 41, 43 (2d Cir. 1987) (in turn quoting *Board of Regents v. Roth*, 408 U.S. at 573)).

The district court found that "[s]uch a deprivation of liberty has been recognized not only where the individual

is employed by the state, but where he *seeks employment* with the state and is denied it." *Walentas*, 636 F. Supp. at 337 (emphasis added) (citing *Doe v. United States Civil Serv. Comm'n*, 483 F. Supp. 539 (S.D.N.Y. 1980)).

In *Doe*, the plaintiff was denied a position as a White House fellow after being named a finalist for one of several such available positions. The file on her application compiled as a result of a government background investigation included accusations that the applicant was a thief, and the resulting report to the White House Fellowship Commission included those accusations without evaluation. The plaintiff claimed that she was never afforded an opportunity to defend against those charges, and accordingly brought suit claiming that she had been deprived of a protectible liberty interest. The court in *Doe* stated the rule "that the liberty interest protected by the Due Process Clause prohibits the government from depriving an individual of government employment on the basis of false charges and then aggravating the injury, and further diminishing employment opportunities, by tarnishing the individual's name and reputation," *Doe*, 483 F. Supp. at 570, and held it applicable with equal force to situations involving the possibility of employment. *Id.* at 569-70. In either case, the court concluded " 'the government's action has operated to bestow a badge of disloyalty or infamy, *with an attendant foreclosure from other employment opportunity*.' " *Id.* at 569 (quoting *Cafeteria and Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 898 (1961)). The district court below accordingly concluded that Walentas pleaded a liberty interest sufficient to withstand a motion to dismiss. *Walentas v. Lipper*, 636 F. Supp. at 336-38.

Not surprisingly, Lipper contends that no such liberty interest exists, claiming that *Doe* was wrongly decided.[2] We need not rule on this issue. Assuming arguendo that Walentas had a protected liberty interest, we concur in the district court's view that Lipper enjoyed a qualified immunity which precludes liability on his part for the invasion of that interest which Walentas alleges.

C. *Qualified Immunity.*

Walentas claims that the district incorrectly applied the standard of qualified immunity in concluding that Lipper was entitled to such immunity. *Walentas v. Lipper*, 662 F. Supp. 902 903-04 (S.D.N.Y. 1987). Walentas contends that the district court ignored an important component of that standard—the "objective legal reasonableness" of Lipper's conduct—and that Lipper's conduct could in no way be considered objectively reasonable. We disagree.

It is settled that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S 800, 818 (1982); *see Procunier v. Navarette*, 434 U.S. 555, 565 (1978). This rule seeks to accommodate conflicting values. On the one hand, there is a need to provide a remedy to those who suffer violations of their constitutional rights resulting from unlawful conduct by government officials. The only satisfactory remedy ordinarily is a civil damage action against such an official. *See Anderson v. Creighton*, 107 S. Ct. 3034, 3038 (1987); *Harlow*, 457 U.S. at 814; *Butz v. Economou*, 438

2 Walentas argues that Lipper should be foreclosed from raising such a claim, since he did not file a cross-appeal. In view of our disposition of this appeal, however, we need not reach that question.

U.S. 478, 506 (1978); *see also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). However, allowing suits against public officials acting in their official capacities entails substantial social costs, such as "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814; *see Anderson*, 107 S. Ct. at 3038. The rule of qualified immunity thus accomplishes a reasonable compromise of these considerations.

"Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson*, 107 S. Ct. at 3038 (1987) (quoting *Harlow*, 457 U.S. at 818-19). Moreover, the legal rule alleged to be "clearly established" at the time must be sufficiently particularized: "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . . [I]n the light of preexisting law the unlawfulness must be apparent." *Anderson*, 107 S. Ct. at 3039 (citing *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986); *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *Davis v. Scherer*, 468 U.S. 183, 191, 195 (1984)). "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. If the law is not clearly established, summary judgment in favor of the official is usually appropriate. *See Mitchell*, 472 U.S. at

536; *Hawkins v. Steingut*, 829 F.2d 317, 322 (2d Cir. 1987).

The district court granted Lipper's motion for summary judgment on the ground that Lipper was entitled to qualified immunity from suit under these standards. *Walentas v. Lipper*, 662 F. Supp. 902, 903-04 (S.D.N.Y. 1987). In so holding, the district court properly inquired "whether it was clearly established in 1984 that public defamation of one seeking state employment (but not yet having obtained it), which impairs his chances for other employment, violates his constitutional right to liberty (of occupation) unless due process of law is followed." *Id.* at 904. Judge Stanton concluded that this proposition was not clearly established at the relevant time. Rather, "only one district court case had extended the principle to a situation where the individual had, as here, not yet obtained the employment and was denied it." *Id.* (citing *Doe v. United States Civil Serv. Comm'n*, 483 F. Supp. 539 (S.D.N.Y. 1980)).[3] Such a right, the district court found, is " 'a nonobvious implication of the due process clause.' " *Id.* (quoting *Colaizzi v. Walker*, 812 F. 2d 304, 308 (7th Cir. 1987)). We agree with the district court that the right postulated in *Doe* was not clearly established at the time of Lipper's alleged malicious actions in early 1984. *See supra* note 3.

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3 Although not cited by the district court or the parties, *Bartel v. FAA*, 725 F.2d 1403 (D.C. Cir. 1984), had stated in January, 1984 that such conduct "*may* . . . have effectively extinguished a legally recognized and protected interest," *id.* at 1415 (emphasis added), and *Larry v. Lawler*, 605 F.2d 954 (7th Cir. 1978), had stated that a "requirement of allowing only written response to adverse information which may trigger a three year debarment *may* well amount to a denial of due process." *Id.* at 962 (emphasis added). We do not regard these cases, in combination with *Doe*, as clearly establishing the right for which Walentas contends in January-March, 1984. Further, we are in agreement with our concurring colleague that this general area of the law, particularly as it relates to public contractors, continues to be unsettled.

Notwithstanding the above, Walentas contends that the district court misapplied the qualified immunity standard. He claims that while the inquiry into whether the right was clearly established at the time of the challenged conduct is unquestionably important, it is equally crucial for a district court to independently inquire into the objective reasonableness of the official's conduct regardless of what the clearly established law was at the time. In other words, Walentas suggests that the test for qualified immunity is in fact a two part analysis.

Specifically, Walentas relies upon the following passage from *Harlow v. Fitzgerald*:

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test thar focuses on the *objective legal reasonableness* of an official's act.

457 U.S. at 819 (emphasis added). He further contends that applying this standard, Lipper's conduct was manifestly unreasonable and unlawful, because Lipper used his public office and the shield of immunity to wage a personal vendetta.

However, we reject Walentas' argument that *Harlow* mandates the application of the two part test which he proposes. Rather, *Harlow* and its progeny make clear that the objective legal reasonableness of an official's actions must be viewed in light of the action's relationship to the clearly established law at the time, and not to some more general standards of reasonable and appropriate governmental conduct. *Cf. Anderson v. Creighton*, 107 S. Ct. 3034, 3039 (1987) ("if the test of 'clearly established law' were to be applied at this level of generality, it would bear

no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*'"). Thus, since the legal proposition argued by Walentas was not clearly established at the relevant time, Lipper's conduct was protected by qualified immunity. Even assuming that Lipper's conduct was unlawful in some sense, it is clear that officials sued for constitutional violations do not lose their qualified immunity solely because their conduct may violate some federal or state statute or administrative regulation. *Davis v. Scherer*, 468 U.S 183, 194 & n.12 (1984).

In sum, the district court properly granted summary judgment in favor of Lipper on the ground that he was entitled to qualified immunity from suit with respect to the alleged violation of Walentas' right to be free from public defamation which impaired his prospects of future employment, since that constitutional right was not clearly established at the time of the challenged action.

III. CONCLUSION

The judgment of the district court is affirmed.

VAN GRAAFEILAND, *Circuit Judge*, concurring in result:

I am convinced that, on an objective basis, no reasonably competent official in Lipper's position would have concluded that the acts described in the complaint herein would violate Walentas' constitutional rights. The constitutional status of public contractors vis-a-vis public employees was, and continues to be, in a state of uncertainty and flux. *See, e.g., Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973); *S & D Maintenance Co, Inc. v. Goldin*, 844 F.2d 962, 965-71 (2d Cir. 1988); *San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1407-10 (9th Cir. 1987); *Horn v. Kean*, 796 F.2d 668, 671-79 and n.10 (3d Cir. 1986) (en banc). Accordingly, I concur in the result.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID C. WALENTAS, Plaintiff,	:
against	:
KENNETH LIPPER, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, and JOHN DOE #5, Defendants.	:85 Civil 1712 :(LLS) :JUDGMENT

Defendant Kenneth Lipper having moved for summary judgment on the grounds that he (1) has qualified immunity from suit under 42 U.S.C. § 1983 and (2) did not violate plaintiff's liberty interest and the said motion having come before the Honorable LOUIS L. STANTON, U.S.D.J., and the Court thereafter on June 18, 1987, having handed down its opinion and order (#61127); granting defendant's motion for summary judgment on the grounds that defendant has qualified immunity from suit under 42 U.S.C. § 1983; directing the Clerk to enter judgment dismissing the complaint, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

DATED: NEW YORK, NEW YORK
June 22, 1987

/s/ Raymond F. Burghardt
Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 6-23-87.

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID C. WALENTAS,	
Plaintiff,	
– against –	
KENNETH LIPPER, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, and JOHN DOE #5,	85 Civ. 1712 (LLS)
Defendants.	OPINION AND ORDER

Defendant Kenneth Lipper moves for summary judgment on the grounds that he (1) has qualified immunity from suit under 42 U.S.C. § 1983 and (2) did not violate plaintiff's liberty interest. Defendant's motion is granted on the first ground.

FACTS

The facts of this case are set forth in an earlier (June 3, 1986) opinion, reported at 636 F. Supp. 331. Plaintiff David Walentas, a real estate developer in New York, brought this action under 42 U.S.C. § 1983 against defendant Kenneth Lipper, at relevant times Deputy Mayor for Finance and Development for New York City, alleging that Mr. Lipper, acting under color of state law, deprived him of property and liberty interests without due process of law.

Mr. Walentas had been conditionally designated developer of a parcel of land in Brooklyn owned in part by New York State and in part by the City of New York. He alleges that Mr. Lipper,

who personally disliked Walentas and was dissatisfied with the way he had managed some other business ventures between them, used his powers as Deputy Mayor for Finance and Development and as overseer of the city organization involved in the project to stop Walentas from carrying out his development plans and from being chosen as the developer of the site. Walentas claims that Lipper publicly defamed him through various media, caused the loss of the Brooklyn project and of prospective opportunities for Walentas freely to engage in his chosen occupation, and deprived him of a protected liberty interest without due process of law. The 1986 opinion, 636 F. Supp. 331, dismissed Walentas' claim for deprivation of a property interest, but held that he had stated a claim for deprivation of a liberty interest.

Thereafter, the question whether Walentas sufficiently pleaded a § 1983 claim for deprivation of a liberty interest was certified, by order dated July 3, 1986, as involving "a controlling question of law as to which there is substantial ground for difference of opinion . . ." but the Court of Appeals denied Lipper's application for an interlocutory appeal.

Based on that certificate and the paucity of analogous decisions, Lipper argues that he could not be objectively responsible for knowing in 1984 that his alleged actions would violate Walentas' constitutional rights – a later-discovered "liberty interest" – and that accordingly he enjoys a government official's immunity from this suit.

Discussion

Qualified Immunity of Government Officials

Harlow v. Fitzgerald, 457 U.S. 800 (1982), holds that

> government officials performing discretionary functions generally are shielded from liability for civil

> damages *insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.* See *Procunier v. Navarette*, 434 U.S. 555, 565, 98 S. Ct. 855, 861, 55 L.Ed.2d 24 (1978); *Wood v. Strickland*, 420 U.S., at 322, 95 S. Ct., at 1001.
>
> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. *If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments*, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id. at 818-19 (footnotes omitted)(emphasis added). Officials are held to have constructive knowledge of established law. *Salahuddin v. Coughlin*, 781 F.2d 24, 27 (2d Cir. 1986). *Harlow* thus established an objective test for immunity: a public official's discretionary actions are immune, regardless of what he actually believed to be the law, if the constitutional right that he is accused of having violated was not clearly established at the time of the alleged violation. *See also Davis v. Scherer*, 468 U.S. 183 (1984)(even where official's conduct violated statutory or administrative provisions, no liability under § 1983 unless the constitutional right he was alleged to have violated was clearly established at the time of the violation — p. 194).

Thus the question is whether it was clearly established in 1984 that public defamation of one seeking state employment (but

not yet having obtained it), which impairs his chances for other employment, violates his constitutional right to liberty (of occupation) unless due process of law is followed.

The answer is that it certainly was not clearly established. While it was clear that due process was required (a name-clearing opportunity) when the state accompanied the termination of a present employee with defamatory publicity (*see* cases cited in *Waltentas* [sic], 636 F. Supp. at 337), only one district court case had extended the principle to a situation where the individual had, as here, not yet obtained the employment and was denied it. *Doe v. United States Civil Service Comm'n*, 483 F. Supp. 539 (S.D.N.Y. 1980).

The legal principle that a stigmatizing denial of a government job or contract deprives the individual of his occupational liberty is "a nonobvious implication of the due process clause," *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987), and "the scope and details of the rule are not apparent merely from a statement of it." *Ibid.* As the certificate pursuant to 28 U.S.C. § 1292(b) in this case stated, there was substantial ground for difference of opinion about the extension of the "liberty interest" analysis to one in Mr. Walentas' position.

Walentas contends that Lipper's actions violated his clearly established "right . . . to contract [and] to engage in any of the common occupations of life . . . ." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). However, the existence of a right to engage in an occupation, and the determination that an action may lie under § 1983 for infringement of that right without due process, are two separate matters on different levels of generality.

> The [*Harlow*] test would have little bite if a right clearly established at *any level of generality* could survive it. "The words 'clearly established . . . constitutional rights' may not be used to read the defense of immunity out of federal tort law by the facile

expedient of stating constitutional rights in the most general possible terms, so that anyone who prevails on the merits of a claim based on (for example) the First Amendment's free exercise of religion clause, however novel that claim is, can defeat the defense of immunity simply by pointing out that the right to the free exercise of one's religion has long been a clearly established constitutional right. The right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful."

Colaizzi, 812 F.2d at 307-8 (quoting *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986)). Mr. Walentas' right was not so "particularized" in 1984.

CONCLUSION

Defendant has qualified immunity from suit under 42 U.S.C. § 1983 and is entitled to summary judgment. The Clerk is directed to enter judgment dismissing the complaint.

Dated: New York, New York
June 17, 1987

/s/ Louis L. Stanton
LOUIS L. STANTON
U. S. D. J.

Appendix D

United States Court of Appeals
for the Second Circuit

Docket No. 86-8060

85 CIV. 1712

DAVID C. WALENTAS,

Plaintiff,

KENNETH LIPPER, JOHN DOE #1, et al.,

Defendant.

NOTICE OF MOTION

For Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b)

MOTION BY:

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel of the City of N.Y.
100 Church Street
New York, New York 10007
(212) 566-4476 Jeffrey Schanback

Has consent of opposing counsel:

A. been sought?	☒ Yes	☐ No
B. been obtained?	☐ Yes	☒ No
Has service been effected?	☒ Yes	☐ No
Is oral argument desired?	☐ Yes	☐ No
(Substantive motions only)		

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order?	☐ Yes	☐ No
B. by firm date of argument notice?	☐ Yes	☐ No

C. If Yes, enter date: _____

OPPOSING COUNSEL:

FISCHBEIN, OLIVIERI, ROSENHOLC & BADILLO
230 Park Avenue
New York, New York
(212) 986-9688 Richard Fischbein

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:
HONORABLE LOUIS L. STANTON - S.D.N.Y. - 85 CIV. 1712

Brief statement of the relief requested:

Order Granting Permission to Appeal

By: *(Signature of attorney)*	Appearing for: *(Name of party)*	Appellant or Petitioner:
/s/ Steven S. Anderson	Kenneth Lipper	☐ Plaintiff
Signed name must be printed beneath	Date	☒ Defendant
Steven S. Anderson	July 17, 1986	Appellee or Respondent:
		☐ Plaintiff
		☐ Defendant

ORDER

Kindly leave this space blank.

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

s/ _____

s/ _____

s/ _____

Aug. 12, 1986
Date

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DAVID C. WALENTAS,

Plaintiff,

— against —

85 Civ. 1712 (LLS)
ORDER

KENNETH LIPPER, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, and JOHN DOE #5,

Defendants.

----------X

This court's Opinion dated June 3, 1986 is amended to include on page 18 the following statement:

The denial of defendant's motion to dismiss, on the ground that plaintiff has sufficiently pleaded a § 1983 claim for deprivation of a liberty interest, involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from this denial may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

Dated: New York, New York
July 3, 1986

Louis L. Stanton
LOUIS L. STANTON
U.S.D.J.

Appendix F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

DAVID C. WALTENTAS,

Plaintiff,

85 Civ. 1712 (LLS)

– against –

OPINION

KENNETH LIPPER, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, and JOHN DOE #5,

Defendants.
----------X

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LOUIS L. STANTON, D.J.

Plaintiff David Walentas, a real estate developer in New York, brings this action pursuant to 28 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343, against defendant Kenneth Lipper,[1] at relevant times Deputy Mayor for Finance and Development for New York City, alleging that Lipper, acting under color of state law, deprived plaintiff of property and liberty interests without due process of law. Defendant moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief can be granted.

FACTS

In April and November 1981, plaintiff purchased, with intent to convert to rentable office space, several buildings located near the Brooklyn Bridge, known cumulatively as the "Brooklake property". Adjacent to that parcel is a piece of property, known for purposes of this law suit as the "RFP site", owned in part by the City of New York and in part by New York State.

In June 1981, the city, through its Public Development Corporation ("PDC"), and the state, through its Urban Development Corporation ("UDC") and its Office of Parks, Recreation and Historic Preservation ("OPRHP"), solicited development proposals for the RFP site. As defendant's position included oversight of the operations of PDC, it is claimed he had considerable control over who would be selected as developer of the project.

The selection process had two phases. Initially, a successful candidate received a conditional designation; he then had to complete various detailed obligations satisfactorily and at his own expense, under a contract between himself and PDC, UDC and OPRHP, before being designated the developer of the project.

On May 27, 1982, plaintiff was conditionally designated by PDC, UDC and OPRHP ("the Parties") as the developer of the

RFP site. He and the Parties signed a Conditional Designation agreement ("the Agreement"), looking to the negotiation of various terms and plans by the Parties with plaintiff and their cooperation with him by providing their approval and directions where required. The Agreement allowed the Parties to terminate it if they were not satisfied with the progress of the negotiations.

Plaintiff proceeded, according to the Agreement, with plans for developing his land and the RFP site. He obtained approval from the City Board of Estimate for an application (Urban Development Action Grant Application) for federal monetary assistance. He submitted applications to the state for tax reductions and low interest loans. In September and October 1983, plaintiff reached agreement with PDC and UDC regarding physical alterations for the site and final budget.

In December 1983, plaintiff entered into negotiations with Lehman Brothers Kuhn Loeb ("Lehman Brothers") regarding leasing by Lehman Brothers of a portion of the Brooklake property. All of the conditions and terms of the lease were agreed upon that month, but a final agreement was contingent upon the plaintiff obtaining the tax reductions sought.

Plaintiff's version, taken as true for purposes of this motion, *Cruz v. Beto*, 405 U.S. 319, 322 (1972), is that all was going smoothly until defendant Lipper, who personally disliked plaintiff and was dissatisfied with the way plaintiff had managed some other business ventures between them, used his powers as Deputy Mayor of Finance and Development and as overseer of the PDC to stop plaintiff from carrying out his development plans and from being chosen as the developer of the RFP site.

Specifically, plaintiff claims that: (1) defendant directed the president of PDC to impose additional burdensome restrictions on plaintiff, such as finding partners who could guarantee financing of the entire project, to be satisfied in less than two

months, or the city would no longer consider him for developer; (2) at the same time, defendant "made it known" to potential partners of plaintiff that the city would "view [them] with extreme disfavor" if they agreed to join plaintiff in the development of the RFP site; (3) defendant, as chairman of the New York Industrial Commerce Incentive Board, to which plaintiff had applied for tax reductions, delayed plaintiff's application, which resulted in Lehman Brothers' declining to reach a formal lease agreement with plaintiff; plaintiff was eventually told that the application would be denied; (4) defendant knowingly gave Councilwoman Ruth Messinger false and disparaging information about plaintiff, which, in February 1984, Councilwoman Messinger disseminated to the public in a press conference; (5) publicly stating he would forward Councilwoman Messinger's allegations to the New York Department of Investigations and actually doing so, defendant told the Commissioner of Investigations to issue a report confirming the allegations without checking their veracity; (6) when the Department did issue that report in March 1984, defendant, knowing the report to be false, distributed copies to the press; (7) in February 1984, defendant told a Daily News reporter, without first consulting either UDC or OPRHP, that plaintiff would not be the developer of the site; (8) in March 1984, defendant held a press conference, without consulting either UDC or OPRHP, during which he made false and disparaging remarks about plaintiff and formally de-designated plaintiff as developer of the site; and (9) on the same day, the president of PDC wrote plaintiff a letter, at the direction of defendant, informing him that he had been de-designated as developer.

Section 1983

To assert a claim under § 1983 plaintiff must show that, as a result of state action, he was deprived of a right protected by the Constitution and federal laws. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Weiss v. Willow Tree Civic Association*, 467 F. Supp. 803, 809 (S.D.N.Y. 1979). Since plaintiff claims he was

deprived of rights protected by the Fourteenth Amendment, he must show that the state deprived him of a life, liberty or property interest without due process of law.

The range of interests protected by the procedural due process clause is not infinite. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). Thus, plaintiff must show that the interests of whose deprivation he complains are substantial enough to invoke the protection of federal law and the federal courts.

1. Property interest

Plaintiff claims a property interest in both "good faith consideration of his application" to become developer of the RFP site and an "expectation" that, it he complied with the terms of the Agreement, he would be selected as developer of the site.

It is not the Constitution, but rather "existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits" that create property interests. *Board of Regents v. Roth*, 408 U.S. at 577. The primary source of property rights is state law. *See Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 447-48 (2d Cir. 1980).

Plaintiff relies on a recent and factually similar New York decision, *Goodstein Construction Corp. v. City of New York*, No. 22803, slip. op. (N.Y. Sup. Ct. May 14, 1985), for his claim that the defendant had an obligation to negotiate with him in good faith under the Agreement, a right to which plaintiff asserts he was entitled separately from any right to final designation as developer. *Goodstein* held that the state, as party to a conditional designation agreement between another developer and New York City had an "immediate responsibility . . . to proceed and negotiate in good faith . . . separate and distinct from any obligation to consummate the transaction." *Id.*, at 4. The

court said the obligation of good faith and fair dealing is "implicit in all contracts." *Id.*, at 3. Plaintiff seems to claim that a breach of the Agreement's obligation to negotiate in good faith is the deprivation of a property interest without due process of law.

New York does recognize, in appropriate circumstances, an implied obligation of good faith in contracts. *See Murphy v. American Home Products Corp.*, 461 N.Y.S.2d 232 (N.Y. 1983). However, in *Murphy* the court declined to find an obligation of good faith or fair dealing in an at-will employment contract, since either party could terminate the employment at any time, and held that "[n]o obligation can be implied . . . which would be inconsistent with other terms of the contractual relationship." *Id.*, at 237.

The Agreement in this case provides that "the Parties may terminate the negotiations at any time if, in their sole discretion, they are not satisfied with the progress of negotiation or if you [plaintiff] fail to satisfy any of the other conditions set forth in this letter." (Agreement p. 2)

In *Goodstein*, the conditional agreement provided that "the City retains the right to terminate negotiations at any time." *Goodstein*, slip. op. at 7. The court in *Goodstein* noted, "[t]he designation agreements obligated both parties to cooperate and exert their best effort [sic] in the creation and negotiation of a plan for the development of the sites." *Goodstein*, slip op. at 3. Similarly the Agreement requires plaintiff and the Parties to negotiate various terms and plans, and requires the Parties' directions for and approval of plaintiff's activities under it. An implied obligation of good faith is not inconsistent with the terms of this Agreement. *See Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 112 (2d Cir. 1985) ("Implied contractual obligations may co-exist with express provisions which seemingly negate them where common expectations or the relationship of the parties as structured by the contract so dictate.") The Agreement

implies an obligation of good faith and fair dealing on the part of each side to the contract.

That obligation, however, is not a property interest protected by the due process clause. The right to good faith negotiation is a contract right, not a property interest.

A mere breach of a contractual right is not a deprivation of property, and thus is not actionable under § 1983. There is a distinction between contract interests and protectible property interests. *McCormick v. Oklahoma City*, 236 U.S. 657 (1915), *Brown v. Brienan*, 722 F.2d 360, 363 (7th Cir. 1983); *accord*, *Heath v. City of Fairfax*, 542 F.2d 1236 (4th Cir. 1976). The Supreme Court has held that the term "property" includes an expectation of continued employment based upon a contract. *Board of Regents v. Roth*, 408 U.S. 564; *Perry v. Sindermann*, 408 U.S. 593 (1972). A public employee holding a position under tenure provisions, a contract or a clearly implied promise of continued employment enjoys a property interest safeguarded by procedural due process. *Board of Regents v. Roth*, 408 U.S. 564; *Perry v. Sindermann*, 408 U.S. 593; *Goetz v. Windsor Central School District*, 698 F.2d 606, 608-9 (2d Cir. 1983). While the line between common law property and contract has been "frayed", only where the breach of contract results in the loss of employment has it been equated with the deprivation of a property interest. *Brown v. Brienan*, 722 F.2d at 363. It is the legitimate expectation of continued employment, and not the contract claim itself, that is protected by due process. *Braden v. Texas A&M University System*, 636 F.2d 90, 92-3 (5th Cir. 1981); *Gendalia v. Gioffre*, 606 F. Supp. 363, 366 (S.D.N.Y. 1985).

Plaintiff does not argue he was employed by the state through the Agreement. *See Armere Holding Corp. v. Bell*, 379 N.Y.S.2d 838 (N.Y. 1975). He asserts he had an "expectation" that he would be finally selected as developer as long as he satisfied all of the conditions set forth in the Agreement. He claims that the Parties' discretion in selecting a developer was limited, by its

obligation of good faith, to simply determining whether plaintiff had satisfied the terms of the Agreement. If so, he would be selected. Plaintiff relies on *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), which held that Nebraska's parole-determination statute, which instructs the Parole Board to grant parole unless one of four stated justifications for deferral exists, gave prisoners an expectation of release entitled to constitutional protection. However, the Agreement gave plaintiff no analogous expectation.

The Agreement between plaintiff and the Parties specifies plaintiff's obligations in some detail. Plaintiff's period as conditional developer was divided into two phases. During the first he was to conduct a study to refine the site and project data including marketing information, cost estimates and engineering studies. During the second phase he was to negotiate and execute a memorandum of intent with the Parties, which would further define (1) the terms of a lease agreement for the project site with plaintiff as tenant and the Parties as landlord, (2) all activities necessary for the development of the project site, (3) the terms of a development fee to be paid to UDC and PDC and (4) any other items the Parties deemed appropriate. The Agreement requires the Parties' approval of "all necessary preliminary plans and specifications and construction documents for the implementation of the Project design" (Agreement p. 3), and provides that "the Parties may terminate the negotiations at any time if, in their sole discretion, they are not satisfied with the progress of negotiation or if you [plaintiff] fail to satisfy any of the other conditions set forth in this letter." Agreement, p. 2.

This language is quite different from the "unique structure and language" of the statute at issue in *Greenholtz*. 442 U.S. at 12. That statute "expressly mandated that the Nebraska Board of Parole 'shall' order the inmate's release 'unless' it decided that one of four specified reasons for denial was applicable." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981). The state was thus obliged to act on prescribed grounds. Here,

the Parties had no such obligation. The Agreement did not mandate that plaintiff was to be designated as developer if he successfully completed its requirements. Although the conditions plaintiff had to satisfy were set forth in detail, the final selection by the Parties was explicitly discretionary.

Only when procedures impose a "significant substantive restriction" on the defendant's decision making does an expectation of a specific decision become a property interest. *Goodisman v. Lytle*, 724 F.2d 818, 820 (9th Cir. 1984); *Cofone v. Manson*, 594 F.2d 934, 937-38 (23 Cir. 1979). No substantive restriction was imposed on the Parties' discretion. They reserved for themselves the right to terminate the arrangement based on their satisfaction. The Parties did have an obligation to negotiate in good faith and cooperate with plaintiff, as discussed *supra*, but that obligation is not inconsistent with their discretionary right to terminate the contract. Even had the Parties acted in good faith and properly exercised their discretion, there is no assurance that they would have selected plaintiff as developer. *See Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58-60 (2d Cir. 1985)(where plaintiff not entitled as a matter of right to license, and no allegation that but for zoning board members' misconduct board would be required to award plaintiff license, no property interest protectible by due process clause). The Parties' approval was necessary at various stages in the process (for plans and designs, as well as plaintiff's selection of consultants), and there was no guarantee it would be forthcoming, even in the exercise of good faith.

Moreover, plaintiff's selection was contingent upon final approval by the New York City Board of Estimate and the Mayor. Agreement, p. 3. Plaintiff had no right to expect such approval. *Goodstein Constr. Corp. v. City of New York*, slip op. at 9 (dissent, Murphy, P.J.); *see Citizens Committee for Faraday Wood v. Lindsay*, 507 F.2d 1065, 1072 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975)(it is proper exercise of discretion for City Housing Development Administration to terminate project when

it feels Board of Estimate approval unlikely because of public protest and political considerations).

The Supreme Court has made clear that "[t]o have a property interest in a benefit, . . . [plaintiff] . . . must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. at 577. Here, plaintiff had no such legitimate claim of entitlement, because he was not entitled to expect that, even if he did satisfy each condition as required, he would be designated as developer.

2. Liberty Interest

Plaintiff claims that defendant publicly defamed him, which resulted in the loss of opportunities for plaintiff freely to engage in his chosen occupation, and deprived him of a protected liberty interest without due process of law.

The Supreme Court has found a protected liberty interest "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him". *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Due process is required to afford the person an opportunity to clear his name, in cases where the defamation also infringes some interest such as employment. *See Board of Regents v. Roth*, 408 U.S. at 573-74.

The cases do not hold that "reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Otherwise, it would be "hard to perceive any logical stopping place to . . . a line of reasoning" that permitted every defamation by a state official to result in a violation of the Fourteenth Amendment. *Id.*, at 698-99.

The Court has held that a liberty interest is involved and due process required when the state terminates an individual's employment and accompanies the dismissal with the publication of false and stigmatizing information about the employee, thus curtailing the employee's future opportunity for employment. *See Codd v. Velger*, 429 U.S. 624 (1977); *Bishop v. Wood*, 426 U.S. 341, 348 (1976); *Board of Regents v. Roth*, 408 U.S. at 573-74; *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438. Such a deprivation of liberty has been recognized not only where the individual is employed by the state, but where he seeks employment with the state and is denied it. *Doe v. United States Civil Serv. Com'n*, 483 F. Supp. 539 (S.D.N.Y. 1980).

In *Doe*, the plaintiff had been selected as one of thirty-two finalists for fourteen positions as White House fellows. Doe was not finally selected. She claimed a deprivation of liberty in that defendant recorded and included false and derogatory statements about Doe in her file, thus making them a basis for decision, without affording her the opportunity to refute them. The Court found that she had been deprived of a liberty interest because although Doe was not employed by the government and thus "the defamation alleged by Doe did not alter or extinguish a right or status previously recognized by state law, *see Paul v. Davis*, *supra*, 424 U.S. at 711, 96 S. Ct. 1155, the 'government['s] action has operated to bestow a badge of disloyalty or infamy, *with an attendant foreclosure from other employment opportunity*.' " *Doe v. United States Civil Serv. Com'n.*, 483 F. Supp. at 569, (emphasis in original), quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898 (1961). The court stated that the factual distinction between *Doe*, where plaintiff claimed she was not selected for employment because of defamatory statements, and cases where the defamation was alleged to have occurred in the course of termination of employment, i.e., *Codd*, *Bishop*, *Roth*, "does not render those decisions inapplicable to the circumstances present here." *Ibid.* In those cases, since the plaintiffs did not have "legally cognizable property interest[s] in the government job at stake", *ibid.*, it was not an interest in employment itself that raised a constitutional issue, but rather

> that the liberty interest protected by the Due Process Clause prohibits the government from depriving an individual of government employment on the basis of false charges and then aggravating the injury, and further diminishing employment opportunities, by tarnishing the individual's name and reputation.

Id., at 570.

The situation here is analogous to that in *Doe*. Although plaintiff was not employed by the state, he claims he was deprived of that employment on the basis of false charges against him which "maligned [his] professional reputation" and "adversely affected his standing and associations in the community." Plaintiff's Memorandum of Law, p. 27. Specifically, plaintiff alleges that defendant made a statement about plaintiff, which he knew to be false, at a press conference that was called to announce plaintiff's de-designation. Complaint, ¶¶ 59-60. Further, he alleges that defendant used his public office to forward false allegations about plaintiff to the Department of Investigations, and ordered that Department to "issue its own report confirming the allegations irrespective of their truth or falsity." Complaint, ¶ 73. When the Department complied, defendant distributed the Report to the press, knowing its contents to be false. Complaint, ¶¶ 76-77.

To state his claim to a hearing before impairment of his liberty interest by government defamation resulting in denial of public employment, plaintiff must allege that the charges against him are false, *see Codd v. Velger*, 429 U.S. at 627-28, and were made public by the offending governmental entity, thus impairing plaintiff's "interest in his 'good name, reputation, honor, or integrity' ". *Bishop v. Wood*, 426 U.S. at 348, quoting *Wisconsin v. Constantineau*, 400 U.S. at 437; *see Gentile v. Wallen*, 562 F.2d 193, 197 (2d Cir. 1977). Plaintiff claims that here.

Accordingly, plaintiff sufficiently pleads a protected liberty interest to withstand a motion to dismiss.

Parratt v. Taylor

Defendant contends that since plaintiff has a sufficient state post-deprivation remedy, namely an Article 78 proceeding, under *Parratt v. Taylor*, 451 U.S. 527 (1981) he has no § 1983 claim for deprivation of his liberty interest; in other words, that the Article 78 proceeding satisfies the due process requirements.[2]

But *Parratt* applies only where the court, ". . . before reaching the question of the adequacy of the state remedies, . . . [finds] . . . 'the necessity of quick action' or 'the impracticality of providing any pre-deprivation process.' " *Burtnieks v. City of New York*, 716 F.2d 982, 988 (2d Cir. 1983), quoting *Parratt*, 451 U.S. at 539. Here, the whole thrust of the complaint is that the plaintiff should have received a hearing or equivalent due process opportunity to clear his name before being denied public employment, after being maligned by a city official. Where such pre-deprivation process should be supplied, *Parratt* does not apply.

Abstention

Defendant urges the court to abstain from exercising jurisdiction, since plaintiff has filed "nearly word-for-word identical complaints" in federal and state court, and thus " '[w]ise judicial administration' counsels that this action be dismissed." Def. Memorandum of Law, p. 18, quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976).

Since defendant submitted this motion, however, the New York Supreme Court has dismissed all but one of plaintiff's state causes of action, that for tortious interference with a business opportunity, in which plaintiff alleges that defendant maliciously induced Lehman Brothers to decline to execute the lease with plaintiff. *Walentas v. Lipper*, NYLJ, p. 6, col. 3, February 25, 1986 (N.Y. S. Ct.).

As the discussion above indicates, plaintiff has properly asserted in this court a § 1983 claim for deprivation of a liberty interest, based on defendant's dissemination to the public of allegedly false and stigmatizing information about plaintiff in the course of denying him public employment.

While plaintiff could have brought his § 1983 claim in state court, *see United States ex rel. Hill v. Johnston*, 321 F. Supp. 818 (S.D.N.Y. 1971) (state courts have same duty as federal courts to uphold the Constitution); *Judo, Inc. v. Peet*, 326 N.Y.S.2d 441 (N.Y. Civ. Ct. 1971), he chose instead to proceed with that claim here. I see no reason at this point to abstain from exercising jurisdiction over his claim. *See generally, McRedmond v. Wilson*, 533 F.2d 757 (2d Cir. 1976) (civil rights actions under § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343, "imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims," quoting *Zwickler v. Koota*, 389 U.S. 241, 248 (1967)).

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 the Court held that where there are concurrent state and federal proceedings, exceptional circumstances regarding "conservation of judicial resources and comprehensive disposition of litigation" may warrant dismissal of the federal suit. *Id.*, at 817, citing *Kevotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 186 (1952); *see also Arkwright-Boston Manufacturers Mutual v. City of New York*, 762 F.2d 205 (2d Cir. 1985).

Here, they do not. Plaintiff's state and federal claims are independent. Although the underlying facts alleged in both proceedings are the same, the facts on which each proceeding will focus will differ. With regard to plaintiff's state claim for tortious interference with his agreement with Lehman Brothers, the testimony and evidence will focus on defendant's role, if any, in delaying plaintiff's application for tax reductions. In this action, the relevant facts will be those surrounding defendant's alleged public defamation of plaintiff and plaintiff's subsequent

de-designation. Moreover, plaintiff's federal claim requires an analysis of federal constitutional law, as opposed to the application of state tort law for his state claim. There is thus little possibility of such duplicative litigation as would warrant dismissal of this federal action. *See Colorado River*, 424 U.S. at 817. I am also mindful of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Ibid.* Abstention from consideration of plaintiff's federal § 1983 claim under these circumstances would be inappropriate.

Conclusion

As a conditional designee with no right to or legitimate expectation of ultimate employment, plaintiff has failed to state a claim under § 1983 for the deprivation of a property interest. He has, however, pleaded a § 1983 claim for deprivation of a liberty interest. Accordingly, defendant's motion to dismiss the complaint is denied.

Dated: New York, New York
June 3, 1986

/s/ Louis L. Stanton

LOUIS L. STANTON
U. S. D. J.

Footnotes

1. Plaintiff also names as defendants John Doe ## 1-5, stating that their identities are presently unknown, but will be determined through discovery.

   For purposes of this motion, however, only defendant Lipper is discussed, as he alone moves to dismiss.

2. Whether *Parratt* applies to deprivation of liberty claims or is limited to those for deprivation of property has not been finally decided in this circuit, *see McClary v. O'Hare*, No. 85-7518, slip. op. at 2147-48 (2d Cir. March 17, 1986), but in either event *Parratt* is inapplicable here.

Appendix G

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
>
> Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under

the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 U.S.C. § 1988 provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Supreme Court, U.S.
FILED
MAR 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1409
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DAVID C. WALENTAS,

Petitioner,

v.

KENNETH LIPPER, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, and JOHN DOE #5,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 21, 1989.

21 pp

COUNTER-STATEMENT OF THE QUESTION PRESENTED

When no case law has held that loss of a conditional designation as developer of a project implicates a liberty interest, is the qualified immunity established by Harlow overcome by alleging that the dedesignation was done with a malicious intent?

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No. 88-1409
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DAVID C. WALENTAS,

Petitioner,

v.

KENNETH LIPPER, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, and JOHN DOE #5,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER-STATEMENT OF THE CASE

We adopt the statement of facts as explained in the Court of Appeals opinion at A2 - A9 with these additions:

After the conditional designation of petitioner's real estate company, Two Trees Management Company, was revoked in March 1984, petitioner's companies continued to do business. One of petitioner's companies

leased approximately two hundred and sixty thousand square feet to the New York State Department of Labor in 1985 (232-33).[1] Another company obtained a lease to rent a parking lot from New York City between July 1985 and June 1986 (280, 284). Moreover, New York City officials continued to negotiate with plaintiff over the Fulton Landing project (261-62). Plaintiff stated in a deposition that the negotiations foundered over his unwillingness to drop his lawsuits against the City and City officials (262-63, 268).

Plaintiff also stated in his deposition that he is a real estate developer and investor, owning properties nationwide but

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[1]Citations preceded by an "A" are to the Appendix to the Petition for Certiorari. Citations without a letter prefix are to the Joint Appendix submitted to the Court of Appeals.

primarily in New York City (203, 209). Plaintiff's business dealings in 1986 included buying land in Phoenix and selling apartments in addition to doing renovations on the buildings at Fulton Landing (246).

The Second Circuit Opinion

The Court first disposed of Mr. Walentas' claim that his company's conditional designation as developer of the Fulton Landing project gave him a property interest protected by 42 U.S.C. §1983. Since the parties' "memorandum of understanding" provided only that they would try to negotiate a "memorandum of intent" and ultimately negotiate a contract, since the negotiations could be terminated "at any time," and since the contract would ultimately have to be approved by the New York City Board of Estimate, the Court found: (A13-14): "Walentas' selection as developer would have been a discretionary

determination by a political body which . . . plaintiff 'had no right to expect.'"

The Court then assumed that Mr. Walentas had a "protected liberty interest" but found that Mr. Lipper had qualified immunity precluding liability for invading that interest (A17). The Court explained the standard adopted by this Court (A18):

> ["W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action ... assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson, 107 S. Ct. at 3038 (1987) (quoting Harlow, 457 U.S. at 819-19). Moreover, the legal rule alleged to be "clearly established" at the time must be sufficiently particularized: "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.... [I]n the light of preexisting law that unlawfulness must be apparent." Anderson, 107 S. Ct. at 3039 (citing Malley v. Briggs, 475 U.S. 511, 528 (1985); Davis v. Scherer, 468 U.S. 183, 191, 195 (1984).

The Court analogized Walentas to an applicant for governmental employment and found that a liberty interest for loss of such status was not "clearly established" in 1984 (A19).

The Court specifically rejected the argument plaintiff raises in his petition that the test of "objective legal reasonableness" means something other than an inquiry into whether it had been clearly established that a constitutional right would be violated by the defendant's actions (A20):

> ... Harlow and its progeny make clear that the objective legal reasonableness of an official's actions must be viewed in light of the action's relationship to the clearly established law at the time, and not to some more general standards of reasonable and appropriate governmental conduct.

Judge Van Graafeiland concurred in the result because "no reasonably competent official" would have known that Mr. Lipper's actions violated plaintiff's constitutional

rights. He described the "constitutional status" of public contractors as "in a state of uncertainty and flux." (A22).

REASONS FOR DENYING THE WRIT

THE LOWER COURT'S DECISION PROPERLY APPLIED THE HARLOW STANDARD AND FOUND A QUALIFIED IMMUNITY BECAUSE NO LAW CLEARLY ESTABLISHED A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN THE STATUS OF CONDITIONAL DESIGNATION AS DEVELOPER OF A GOVERNMENTAL PROJECT.

The Court below properly applied this Court's well established standard for the application of qualified immunity under 42 U.S.C. §1983. As this Court has repeatedly explained, whether a government official receives qualified immunity "generally turns on the objective legal reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 3038 (1987) (quotations and citations omitted). See also Davis v. Scherer, 468 U.S. 183 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Plaintiff argues that the test of "objective legal reasonableness" looks to something other than whether Mr. Lipper's alleged actions violated a clearly established constitutional right. He argues that even if the right was not clearly established, no immunity can exist if Mr. Lipper acted with malice. (Petition Point I). This position was discussed and firmly rejected in Harlow where this Court held that subjective good faith is not part of the standard for qualified immunity. 457 U.S. at 815-818. As this Court held in Harlow and has reiterated in subsequent cases, the only relevant question is whether the governmental official's conduct violated a "clearly established" constitutional right. Harlow, 457 U.S. at 818; Davis, 468 U.S. at 197; Anderson, 107 S. Ct. 3039.

The Court below had no difficulty in concluding that no clearly established

constitutional right is at issue in this case. Petitioner does not argue that any court had ever found a liberty interest in his circumstances. This Court has found a protected liberty interest only where the government stigmatizes a citizen and deprives him or her of government employment. See Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972). Moreover, even in cases involving the loss of employment, a liberty interest is not implicated if "other employment opportunity" is available. See Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 898 (1961).

Petitioner cannot claim that he was a government employee. Instead he asserts that he falls within the line of cases finding a liberty interest when a contractor has been stigmatized and barred from doing business with the government. See Smith & Wesson,

Division of Bangor Punta Corp. v. U.S., 782 F.2d 1074 (1st Cir., 1986); Conset Corp. v. Community Services Administration, 655 F.2d 1291 (D.C. Cir., 1981); Transco Security, Inc. of Ohio v. Freeman, 639 F.2d 318 (6th Cir.), cert. denied, 454 U.S. 820 (1981); Myers & Myers, Inc. v. U.S. Postal Service, 527 F.2d 1252 (2d Cir., 1975).

But those cases hold that a liberty interest is not implicated unless the plaintiff can demonstrate, at a minimum, that he or she has been foreclosed from doing business with the government. A liberty interest is implicated only when the government "effectively bars a contractor from virtually all Government work ...." Old Dominion Diary Products, Inc. v. Secretary of Defense, 631 F.2d 953, 955 (D.C. Cir., 1980). See also Smith & Wesson, 782 F.2d at 1081 (1st Cir.) (same); Transco Security v. Freeman, 639 F.2d at 321 (6th Cir.) (same).

Plaintiff has not been barred from government work. Accepting plaintiff's allegations as true, he has lost government business because of the allegedly defamatory Department of Investigation ("DOI") report (18, 254, 271-72). He has not, however, been foreclosed from doing business with New York City or other governments. After the DOI report was released in 1984, plaintiff entered into an agreement with the City to lease a parking lot (284). Also after release of the DOI report, plaintiff entered into a major lease with New York State (232). Moreover, the City reconsidered its decision to dedesignate plaintiff's company and negotiations over the Fulton Landing project continued for years after release of the report until, in plaintiff's version, they ended because he refused to drop his litigation over the project (261-62, 268, 286-87). Although the Fulton Landing

development may well have been a primary focus of plaintiff's business activity, the loss of the opportunity to negotiate one deal is not a deprivation of a constitutionally protected liberty interest. Old Dominion Dairy, 631 F.2d 953; Myers & Myers, 527 F.2d 1252.

Moreover, plaintiff has not lost the right to practice his profession; he has interests apart from his government contracts (203). See McElroy, 367 U.S. at 898 (no liberty interest where opportunities for non-governmental employment were available). Plaintiff has bought and sold properties in Phoenix since his dedesignation and is negotiating to buy other properties there (223, 246). He is currently renegotiating a project with the New York City Folk Art Museum which allegedly fell through because of the DOI report (223). Plaintiff is also renovating his Fulton

Landing properties (246). Given these governmental and non-governmental projects within and outside New York City, it cannot be said that plaintiff has been foreclosed from practicing his profession of real estate developer and investor (203). Thus, the Court below properly found that the law in 1984 did not "clearly establish" that plaintiff had a federally protected liberty interest in his company's status as conditionally designated developer of the Fulton Landing project.

Finally, petitioner's claim that the Second Circuit will find law "clearly established" only when a prior case is on all fours with the one under review (Petition at 12 -21) is simply wrong. When it has had occasion to describe its approach, the Second Circuit has stated: "The very action in question need not previously have been held unlawful, but the unlawfulness

must be apparent in light of preexisting law." Neu v. Corcoran, ___ F.2d ___, Slip. op. at 1731 (2d Cir., 1989) (discussing when law clearly establishes a liberty interest). See also Shabazz v. Coughlin, 852 F.2d 697, 701 (2d Cir., 1988). (discussing when law is clearly established).

When, as in the case at bar, the plaintiff alleges violation of a constitutional right that has not been "'clearly established' by any reasonable definition of the phrase" the Second Circuit has readily applied the qualified immunity standard. In these circumstances, the standard presents no difficulties. See Zweibon v. Mitchell, 720 F.2d 162, 169 (D.C. Cir., 1983), cert. denied, 469 U.S. 880 (1984); Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir., 1984), cert. denied sub nom. Brennan v. Hobson, 470 U.S. 1084 (1985) (no clearly established right). See also Lynch v. Cannatella, 810

F.2d 1363, 1375 (5th Cir., 1987) (clearly established right). Accordingly, this case does not present the problem of defining the contours of the "clearly established" standard, which petitioner asks this Court to review.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

March 21, 1989

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No. 88-1409

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I

THE SECOND CIRCUIT'S RECENT DECISION IN *NEU* v. *CORCORAN* REITERATES THAT CIRCUIT'S OVERLY RESTRICTIVE APPROACH TO THE CLEARLY ESTABLISHED LAW COMPONENT OF THE QUALIFIED IMMUNITY DEFENSE

Respondent Lipper, in his opposing brief, relies on *Neu* v. *Corcoran*, No. 88-7914, slip op. at 1727 (2d Cir., March 3, 1989), a case decided by the Second Circuit exactly one week after

Walentas filed his petition for a writ of certiorari in this Court. The *Neu* case dramatically illustrates the problems inherent in the Second Circuit's inflexible pro-defendant position on qualified immunity, and the importance of resolving the questions presented in Walentas' petition.

Once again in *Neu*, the Second Circuit applied an overly restrictive approach to the question of clearly established law, and found that the defendant state officials were entitled to qualified immunity because there was no prior case which clearly established that their conduct deprived the plaintiff of a liberty interest protected by the due process guarantees of the Fourteenth Amendment.

Neu alleged that two state insurance officials deprived him of a liberty interest by defaming him and imposing a stigma that foreclosed him from practicing his profession as an insurance salesman. The Second Circuit relied on its decision in *Walentas* v. *Lipper*, 862 F.2d 414 (2d Cir. 1988)[1] to bolster its conclusion in *Neu*, that because the alleged defamation did not occur in the course of dismissal from a *government job*, Neu's claim did not rise to the level of a constitutional violation. *Neu*, slip op. at 1740.

Respondent Lipper relies on *Neu* to support its argument that the Second Circuit does not require a prior case on all fours with the one under review to find that a clearly established constitutional right has been violated (Brief in Opp., pp. 13-14). In fact, the *Neu* court only gives lip service to that proposition when it states, "[t]he very action in question need not previously have been held unlawful, but the unlawfulness must be apparent in light of preexisting law." *Neu*, slip op. at 1731 (*citing*, *Anderson* v. *Creighton*, 483 U.S. 635 (1987).

Contrary to that proposition, the entire focus of the *Neu* decision is a painstaking analysis geared to making hair-line

[1] After Walentas' petition was filed in this Court, the Second Circuit's opinion was published and is now reported as *Walentas* v. *Lipper* at 862 F.2d 414 (2d Cir. 1988).

distinctions among the cases reliled on by Walentas and Neu to prove that the right to practice one's chosen profession without unreasonable government interference is clearly established by the decisions of this Court, and the other circuit courts, as well as the Second Circuit's own prior cases.

The combination of *Walentas* and *Neu* makes it virtually impossible in the Second Circuit for a private citizen who has been defamed by a government official and foreclosed from future business opportunities, to survive a motion for summary judgment on the ground of qualified immunity in a 42 U.S.C. §1983 action for damages premised on the deprivation of a constitutionally protected liberty interest.

It is well established that a liberty interest is implicated when the government dismisses an employee based on charges "that might seriously damage his standing and associations in his community," or that might impose "on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972). The charges against the employee must be made "public" by the government employer, *Bishop* v. *Wood*, 426 U.S. 341, 348 (1976), and the employee must allege that the charges are false, *Codd* v. *Velger*, 429 U.S. 624, 627 (1977).

In *Walentas*, the Second Circuit acknowledged that at least three cases had applied those principles with equal force in situations involving the *possibility* of employment. *Walentas* v. *Lipper*, 862 F.2d 414, 422, n.3 (2d Cir. 1988) (*citing*, *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984); *Larry* v. *Lawler*, 605 F.2d 954 (7th Cir. 1978); and *Doe* v. *United States Civil Serv. Comm'n*, 483 F.Supp. 539 (S.D.N.Y. 1980)). Nevertheless, the Second Circuit refused to recognize that *Bartel*, *Larry* and *Doe* had clearly established that the deprivation of a liberty interest may occur where there had been a stigmatizing denial or foreclosure from employment opportunities in a pre-employment context.

Contrary to the Second Circuit's interpretation in *Walentas* and *Neu*, this Court has never held that dismissal or

termination from a government job is a pre-requisite to finding a constitutional deprivation of liberty. This Court's decisions in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Paul* v. *Davis*, 424 U.S. 693 (1976) established what is commonly known as the "stigma plus" or "reputation plus" test. Although the parameters of an injury to reputation are clear, the contours of the "plus" remain ambiguous. The Second Circuit admitted as much in *Neu* when it observed in dicta,

> "On the one hand, *Paul* suggested that reputation, together with 'some more tangible interests such as employment,' could constitute a liberty interest. 424 U.S. at 701. It did not say that 'employment' had to be *government* employment. Thus, *Paul* might plausibly be interpreted as holding that any governmental defamation that causes a person to lose his job and impairs his ability to pursue his chosen profession or occupation is enough to constitute a deprivation of liberty, even if it does not occur in the course of dismissal from government employment or alteration of some other right or status recognized by state law. The 'plus,' in other words, might simply be that a consequence of the defamation was deprivation of the right, recognized in *Meyer* v. *Nebraska* [262 U.S. 390, 399 (1923)], 'to engage in any of the common occupations of life.'" (Emphasis in the original.) *Neu*, slip op. at 1736.

In *Neu*, the Second Circuit held that because Neu had been prosecuted for selling insurance without a license, he had no legally protected status entitling him to pursue his occupation in disregard of state law. *Neu*, slip op. at 1742, n.3. No such charges of wrongdoing have been made against Walentas, and the termination of his status as the developer of the Fulton Landing project was sufficient to constitute a deprivation of a liberty interest.

In short, Respondent Lipper's brief in opposition ignores the most significant issue raised in Walentas' petition concerning the existence of a conflict between the Second Circuit's rigid

analysis of clearly established law and the more flexible approach adopted by most other circuit courts. Nor does Lipper offer any policy reasons in support of the Second Circuit's overly restrictive treatment in *Walentas* and *Neu* of this Court's qualified immunity decisions.

II

RESPONDENT'S BRIEF IN OPPOSITION OFFERS NO PERSUASIVE REASON FOR DENYING CERTIORARI

Respondent Lipper does not offer any cogent reason why this case does not present an ideal opportunity for this Court to address the immunity questions raised in Walentas' petition, nor does Lipper deny the importance of those issues. Instead, Lipper attempts to argue the case on the merits, by raising trivial factual questions which are not relevant for the purpose of determining the issue of immunity.

It is important to emphasize that the Second Circuit was reviewing a grant of summary judgment, and if there were genuine issues of material facts before the district court, then the grant of summary judgment was improper. Nevertheless, given the procedural posture in which the appeal came to the Second Circuit, the court assumed the truth of the plaintiff's allegations, *Walentas* v. *Lipper*, 862 F.2d at 415 (*citing*, *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Hawkins* v. *Steingut*, 829 F.2d 317, 319 (2d Cir. 1987); *Luce* v. *Edelstein*, 802 F.2d 49, 52 (2d Cir. 1986)), and accepted Walentas' account of the facts.

Thus, the issue before the Second Circuit was limited to whether based on the plaintiff's allegations, Walentas had a clearly established constitutional right which precluded a finding of qualified immunity. Because of the Second Circuit's restrictive analysis of the liberty interest cases, and the court's rigid insistence on a precise factual correspondence between the conduct at issue and reported case law, Lipper was granted immunity and Walentas was denied his day in court.

Despite this procedural posture, the brief in opposition attempts to shift the focus from Lipper's wrongful conduct by introducing irrelevant facts and specious arguments. For instance, the fact that Walentas was not a government employee is a distinction with no real difference. In New York, the real estate development business involves a close partnership among government agencies, financial institutions and private developers. Walentas' designation as the developer of a $160 million project sponsored by two State agencies and one City agency on a fifteen-acre parcel of government-owned property, should at the very least be considered "quasi-governmental." That was the case in *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980), where the director of a not-for-profit corporation responsible for urban redevelopment in Syracuse successfully asserted a liberty interest claim when he alleged that city officials had mounted a campaign to have him fired.

Respondent Lipper also argues that Walentas "had no federally protected liberty interest in his company's status as conditionally designated developer of the Fulton Landing project." (Brief in Opp., p. 13). This statement ignores the fact that customarily the final designation of the developer of a government project is a ministerial act to be performed by the City and State agencies that selected the conditional designee. Otherwise, no conditional designee would ever incur the enormous costs necessary to prepare the final plans for a project of this size. In this case, even if the City had wanted to terminate the contract, Walentas had no reason to assume the termination was effective without the concurrence of the two State agencies also responsible for the project. Thus it is clear that, but for Lipper's intervention, the final designation would have been awarded to Walentas.

Respondent Lipper's brief in opposition does not deny that Walentas was stigmatized by the publication of false statements in conjunction with his removal as the developer of Fulton Landing. Rather, Lipper questions whether Walentas can substantiate his claim that he has been foreclosed from a range of career opportunities (Brief in Opp., pp. 2-3, 11-13). For instance, while

it may be true that negotiations over Fulton Landing continued after Lipper resigned as Deputy Mayor, the fact is that Walentas was never reinstated as the developer, and the redevelopment plans for the Brooklyn waterfront remain dormant to this day.

Respondent Lipper also questions whether Walentas was deprived of any private real estate development opportunities, including the Museum of American Folk Art project. However, these factual issues as to whether, and to what degree Walentas was harmed cannot be resolved on a motion for summary judgment. Walentas should be permitted to depose witnesses and otherwise conduct discovery on the issue of damages and his foreclosure from these government and non-government projects. The grant of summary judgment precluded that opportunity for discovery.

Finally, Respondent Lipper grossly distorts Walentas' argument concerning the standard for qualified immunity by claiming that contrary to the holding of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), Walentas relies on Lipper's malicious motives to reintroduce the subjective element of the immunity defense. (Brief in Opp., p. 8). Stated more accurately, it is Walentas' position that *viewed objectively*, Lipper's conduct cannot reasonably be characterized as being in good faith.

Although the *Harlow* Court rejected any inquiry into malicious intent, it by no means eliminated the requirement that a government official's actions be reasonable and undertaken in good faith. In fact, the term "qualified immunity" is often used interchangeably with "good faith immunity" throughout the Court's opinion.[2]

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[2] For instance, *Harlow* states that "[q]ualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." 457 U.S. at 815 (*citing*, *Gomez* v. *Toledo*, 446 U.S. 635 (1980)), and that the Court's decision only applied to civil damage suits arising from "actions within the scope of an official's duties and in 'objective' good faith." 457 U.S. 819, n. 34.

The Second Circuit applied "good faith immunity" in such a way as to make Lipper's "good faith" irrelevant. Thus, the circuit court ignored the dictates of this Court in *Harlow* and its progeny, which make immunity available only to those public officials whose conduct conforms to a standard of objective legal reasonableness.

CONCLUSION

For the reasons set forth above, this petition for certiorari should be granted.

Dated: New York, New York
March 31, 1989

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